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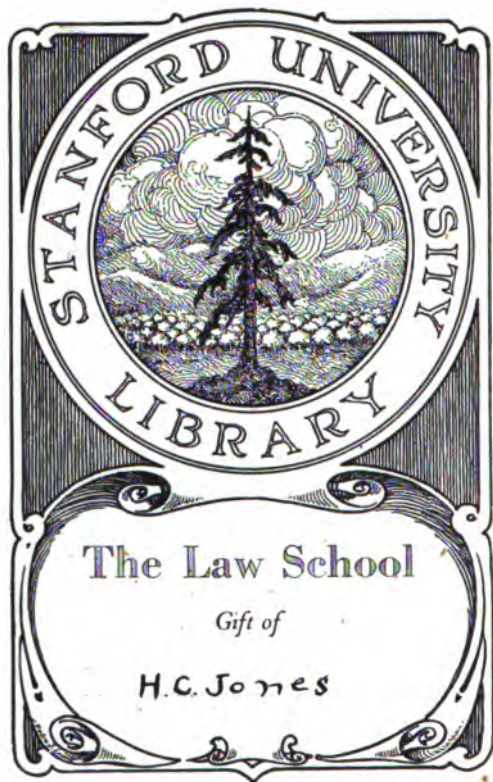
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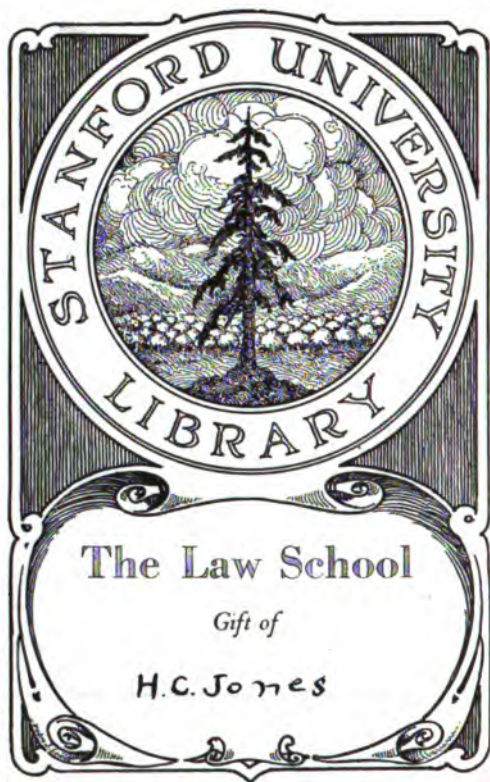
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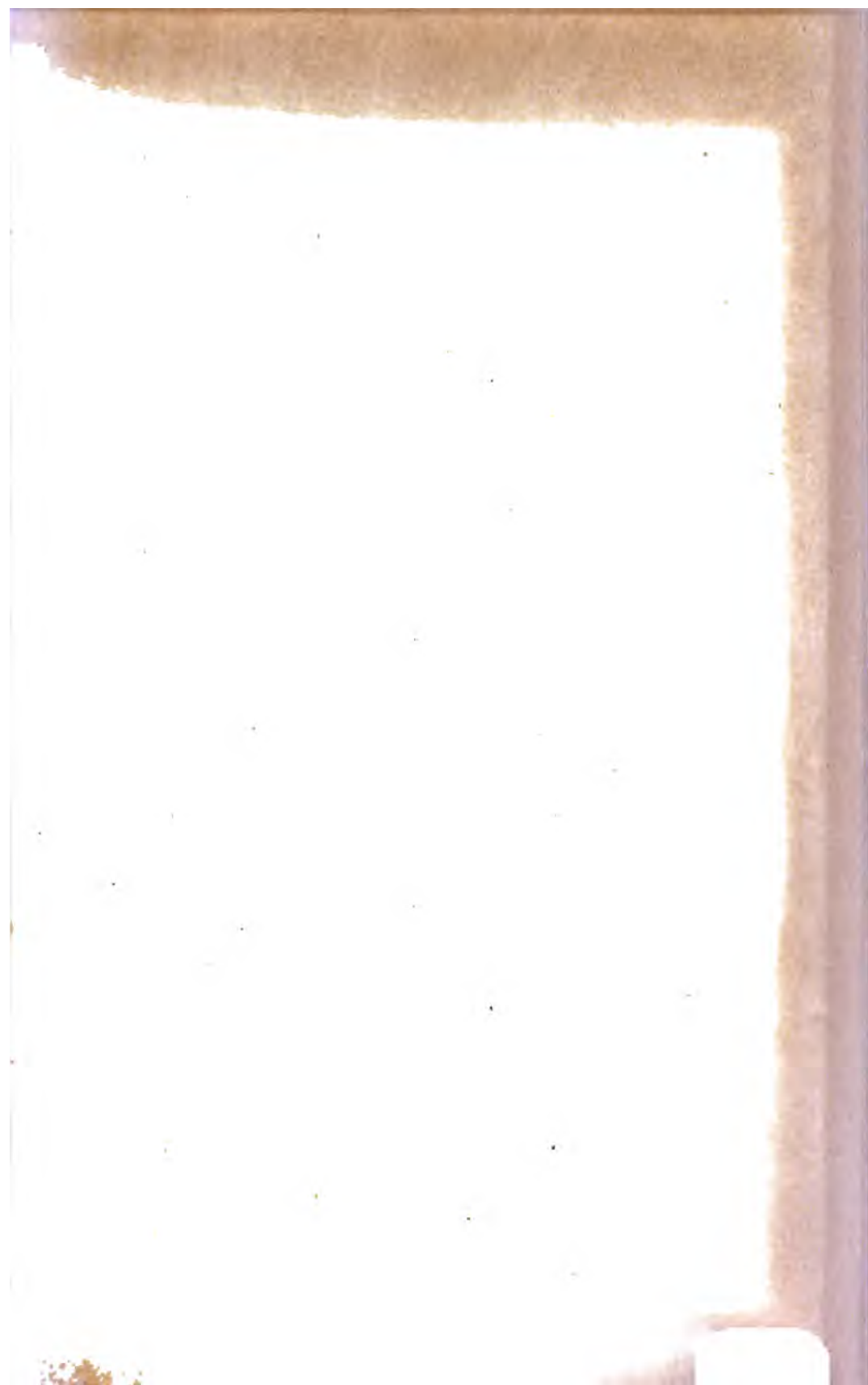
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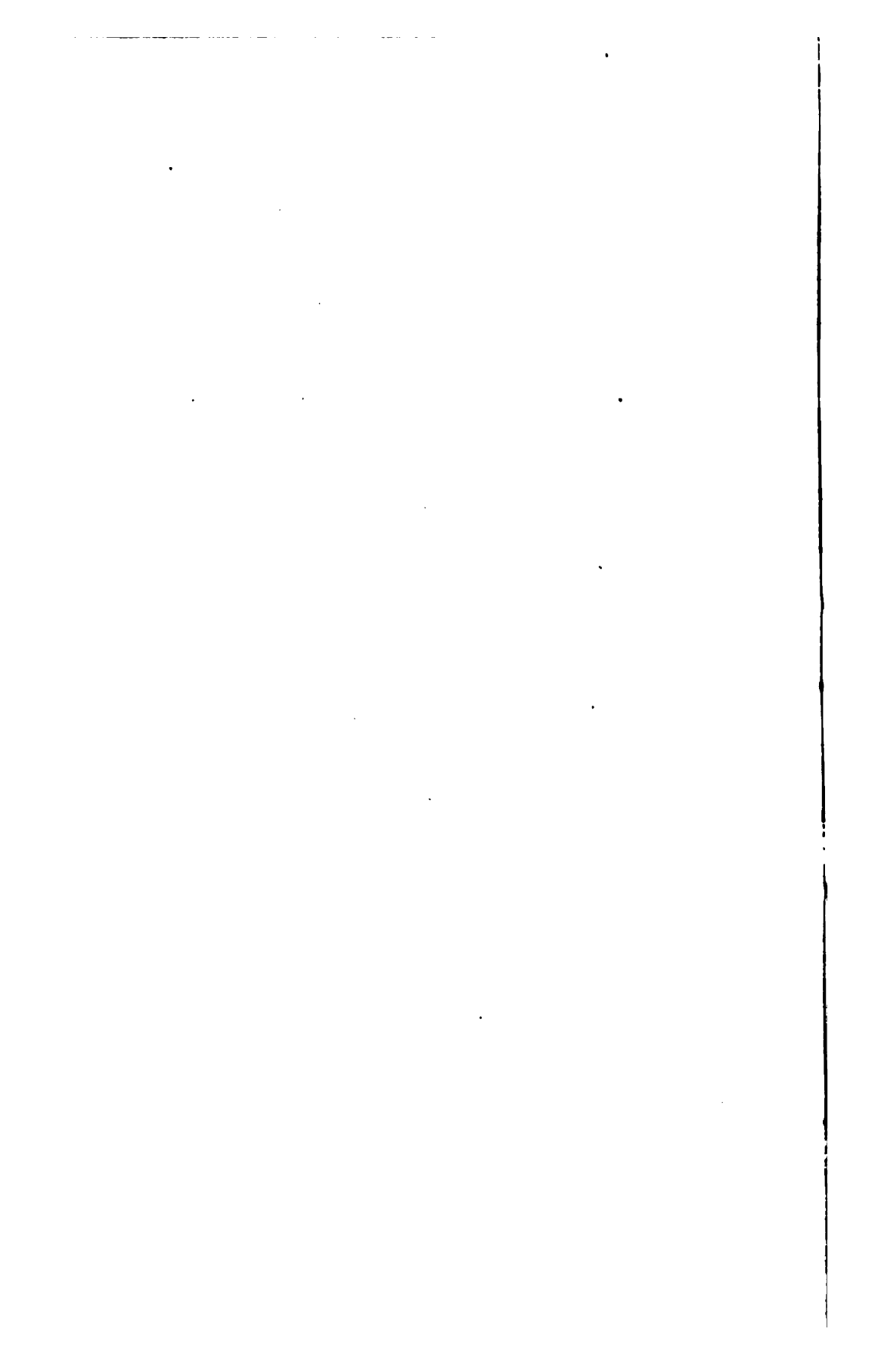
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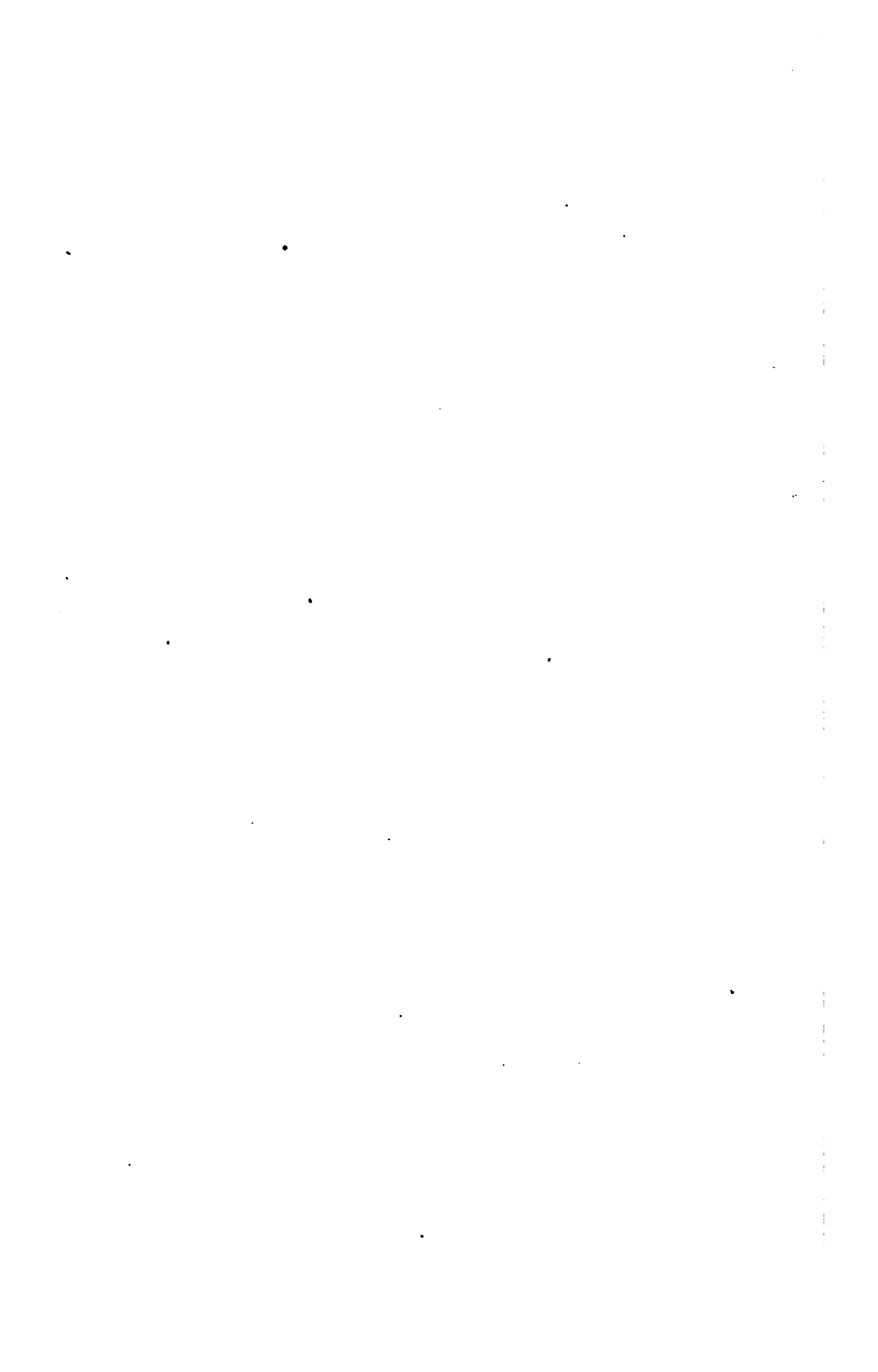




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THE
AMERICAN PROBATE REPORTS:

CONTAINING
RECENT CASES OF GENERAL VALUE DECIDED IN
THE COURTS OF THE SEVERAL STATES
ON POINTS OF PROBATE LAW.

WITH NOTES AND REFERENCES.

By
A. A. GREENHOOT,
OF THE NEW YORK BAR.

VOL. VIII.

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RIGGS PRINTING & PUBLISHING CO.
27 & 29 COLUMBIA ST., 22, 24, 26, 28 MONTGOMERY.
ALBANY, N. Y.

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JAMES S. ADAMS *vs.* ANNE T. ADAMS, AND OTHERS.

[154 Massachusetts, 290.]

LEGITIMATION OF A CHILD BY MARRIAGE OF PARENTS—ILLEGALITY OF MARRIAGE—VOID DIVORCE—CONFLICT OF LAWS.

In a suit to establish the legitimation of a child under Civil Code, Cal., § 215, by the subsequent marriage of its parent, the validity of a divorce previously granted the father may be called in question.

Such divorce is void if at the time of the commencement of the suit he had not been six months a resident of the state, as required by Civil Code, Cal., § 128, and the subsequent marriage is therefore also void.

Neither Civil Code, Cal., § 84, providing that when a marriage is annulled on the ground that a former spouse is living, children begotten before the judgment are legitimate, nor section 487, providing that the issue of marriages null in law shall be legitimate, have any bearing on such a case, but must be confined to children born during the marriage.

The legitimacy of such child must be governed by the law of California, where the marriage took place and where he and his parents were then domiciled, and not by the law of Texas, where the father was domiciled at the time of the birth of child.

Such child is not entitled to claim under a bequest to "the present wife" of its father "for the benefit of herself and all the children" of the father.

APPEAL by Charles Adams from judgment of Supreme Judicial Court, Suffolk County, dismissing bill to establish his right under a will.

H. R. Bailey, for plaintiff.

Jabez Fox, A. M. Morse, Jr., with him, for defendants.

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HOLMES, J.—This is a bill in equity, by which the plaintiff seeks to establish his right to a share in a fund left by the will of Seth Adams of Newton, Massachusetts, to the “present wife” of his brother, Charles W. Adams, “for the benefit of herself and all the children of said Charles in equal proportions.” The testator died in this state on December 7, 1873, and the will was dated February 15, 1872. The question is whether the plaintiff is one of the children within the meaning of the will. The wife referred to is admitted to be the defendant Anne T. Adams, who was married to Charles in Maine in 1854, he then being a resident of New York. The plaintiff is the child of Charles W. Adams and Hannah Phillips, was born in California on August 28, 1881, and was then illegitimate. At that time Charles W. Adams’ domicile was in Texas. In October, 1881, Charles W. Adams changed his domicile to California, and on December 3, 1881, he began an action there for divorce against the above-mentioned Anne, and got a decree on April 13, 1882. It is found that he had not been a resident of the state for six months next preceding the commencement of the action, as required by the California Civil Code, § 128, and that for this reason the court had no jurisdiction of the action, but that the court was imposed upon by Charles W. Adams. We may also mention that it is found that the wife of Charles W. Adams was then residing in Massachusetts, and had no actual notice of the action, and that it might be a question, if material, whether her domicile followed that of her husband. (California Civil Code, § 129; *Burlen v. Shannon*, 115 Mass. 438, 447, 448.) On April 20, 1882, Charles W. Adams married Hannah Phillips in California, then having his domicile there, and after the marriage recognized the plaintiff as his son. By the law of California a child born before wedlock becomes legitimate by the subsequent marriage of its parents. (Civil Code, § 215.) The law of Texas is similar if the child is recognized by the father. (Rev. Sts. 1879, § 1656).

The word “children,” in a Massachusetts will, means legitimate children. (*Kent v. Barker*, 2 Gray, 535, 536.)

Probably the meaning would be the same, even if the parents referred to and the child were domiciled in a state where illegitimate children were recognized as children for some purposes. (*Lincoln v. Perry*, 149 Mass. 368, 373, 374.) But we do not need to consider this at length, as it does not appear that the law of California or of Texas, would recognize the plaintiff as the child of Charles W. Adams for the present purpose unless he were legitimate, as Charles W. Adams in any case was only domiciled in California for a short time, long after the testator's death, and after the birth of his child, and died domiciled in Massachusetts. The plaintiff's case is put wholly upon his having been legitimated. We assume for the purposes of our decision, that, if he has been legitimated, he is entitled to a share under the will. (*Loring v. Thorndike*, 5 Allen, 257; *Sleigh v. Strider*, 5 Call, 439; *In re Andros*, 24 Ch. D. 637.) We may as well add here, that, if the Texas domicile of Charles W. Adams at the time of the birth of his son was material (*Ross v. Ross*, 129 Mass. 243, 256; *In re Grove*, 40 Ch. D. 216), no difference based on that fact, and favorable to the plaintiff, has been called to our attention. We shall speak only of the law of California in dealing with this part of the case. We shall not consider whether, if it were necessary to satisfy the requirements of the Texas statute, a marriage in California would do so.

It may be assumed that the California statute to which we have referred (Civil Code, § 215) requires a valid marriage to legitimate an earlier-born child. (*Loring v. Thorndike*, 5 Allen, 258, 263, 269; *Greenhow v. James*, 80 Va. 636, 641.) For Charles W. Adams' marriage to be valid it was necessary that he should have obtained a valid divorce. But if we should assume that the decree of divorce was valid in California, so that Charles W. Adams had a capacity to marry there, and that his marriage conferred the *status* of a legitimate child upon his son by the law of that state, we should encounter doubts like those expressed by Lord COLONSAY in *Shaw v. Gould*, L. R. 3 H. L. 55, 97, whether at any distance of time we were to reopen the in-

quiry into circumstances of Charles W. Adams' resort to the California court. The California record shows that the court there found that Charles W. Adams had been a resident of the state for the necessary time. There is color in the California decisions put in evidence for the argument that this finding could not be impeached collaterally in California, and thus that the case supposed is the case before us.

Taking the case this way for a moment, we still are unable to decide it in favor of the plaintiff. The rule that the *status* of the domicile is the *status* everywhere must yield when the *status* is constructed on principles which are contrary to those which are generally recognized, or which can be admitted by the law of the forum resorted to. See *Ross v. Ross* (129 Mass. 243.) We should agree with the English decisions so far as this, that the fact that a marriage has taken place on the faith of a previous divorce does not preclude an inquiry by the courts of another state into the capacity of the divorced party and thus into the validity of the divorce, or a denial of the validity of the marriage if the divorce is one which would be decreed void if it were directly in issue. A purely voluntary contract of marriage cannot be allowed to impart a conclusive character to a decree which before could have been examined. (*Smith v. Smith*, 13 Gray, 209, 210; *Shaw v. Gould*, L. R. 3 H. L. 55; *Shaw v. Attorney General*, L. R. 2 Prob. & Div. 156; *Briggs v. Briggs*, 5 Prob. Div. 163.)

The present case offers remarkably little ground for hesitation in going into this inquiry. Marriage in California is, or may be, a pure matter of private contract entered into without intervention of the state except for purposes of registration. (Civil Code, §§ 55, 75, 78; *Graham v. Bennett*, 2 Cal. 503.) The mother's rights are not in question; and, if they were, she did not stand at all in the position of a purchaser for value without notice. She is found to have known all the facts, and her belief in Charles W. Adams' capacity to contract marriage was simply an opinion about California law. We are not now considering the condi-

tions of a putative marriage, as to which different views have been expressed. (*Glass v. Glass*, 114 Mass. 563, 566; *Shaw v. Gould*, L. R. 3 H. L. 55, 97; *Succession of Buisiere*, 41 La. Ann. 217, 220, 221; *Harris v. Harris*, 85 Ky. 40.) The plaintiff is claiming a purely gratuitous benefit as an incidental result of the proceedings in California, at the expense of other children who were not parties to any of those proceedings or entitled to be heard at any stage of them but who nevertheless are precluded from their denying their validity.

If the validity of the divorce were immediately in issue it could be impeached here for want of jurisdiction, notwithstanding the recitals in the record, and those recitals could be contradicted by parol evidence. (*Sewall v. Sewall*, 122 Mass. 156, 161; *Cummington v. Belchertown*, 149 Mass. 223, 225; *Thompson v. Withman*, 18 Wall. 457. See *Bowler v. Huston*, 30 Grat. 266; *Mitchell v. Ferris*, 5 Houst. 34; *Eager v. Stover*, 59 Mo. 87.) For instance, if Charles W. Adams had married Hannah Phillips in this state, and had been indicted for polygamy. (*People v. Dawell*, 25 Mich. 247; *Van Fossen v. State*, 37 Ohio St. 317, 320. See *People v. Baker*, 76 N. Y. 78.) Or even in a proceeding between the parties to the divorce, if the one raising the objection had not appeared in that cause, and was not domiciled in the state where it was granted. (*Reed v. Reed*, 52 Mich. 117, 121; 17 N. W. Rep. 720; *Cross v. Cross*, 108 N. Y. 628; 15 N. E. Rep. 333. See *Chaney v. Bryant*, 15 Lea. [Tenn.] 589; *Leith v. Leith*, 39 N. H. 20, 41.) So, a *fortiori*, where the question is raised, as here, by third persons, whose rights are concerned, and who were not parties to or entitled to be heard in the divorce suit. (See *Gregory v. Gregory*, 78 Me. 187, 190; *Neff v. Beauchamp*, 74 Iowa, 92, 94; 36 N. W. Rep. 905; *O'Dea v. O'Dea*, 101 N. Y. 23; 4 N. E. Rep. 110; *Cummington v. Belchertown*, 149 Mass. 223; 21 N. E. Rep. 435; *Shaw v. Gould*, L. R. 3 H. L. 55.) In *Hood v. Hood*, (11 Allen, 196), the fact of domicile was tried between the original parties for the purpose of determining the jurisdiction of an Illinois divorce, and in *Hood v. Hood*

(110 Mass. 463), it was the Massachusetts, not the Illinois, decree which was held conclusive on third persons, they offering evidence only to impeach the Illinois decree. See, also *Burlen v. Shannon* (115 Mass. 438, 445, 449; Pub. St. c. 146, § 41.)

There is no doubt that the requirement of six months' residence goes to the jurisdiction of the court. The finding of the judge on this point is confirmed not only by the plain effect of the California statute, but by the express statement of the Supreme Court of that state, and by its intimation that a divorce granted without that prerequisite would not be binding in any other state. (*Bennett v. Bennett*, 28 Cal. 599, 601; *People v. Dawell*, 25 Mich. 247, 263, 264.)

But although we have made the assumption for a moment, we by no means are prepared to concede that, if the present case arose in California, under a California will, it would be decided differently there. The universal effect of a judgment *in rem* in establishing or changing a *status* or title, whether given to it by a statute or by the tradition of the courts, rests on the practical necessity of the case, because the effect is of a nature to concern strangers to the proceedings. It would be inconvenient for parties to be divorced as between them, and yet married towards the world. The same convenience makes it desirable that the effect should be the same wherever the question arises, whether within the jurisdiction or without it, and therefore in the case of a decree which would be void outside the jurisdiction, that it should not be held conclusive within it. The decree, if binding in California, would be binding everywhere. (*Cheever v. Wilson*, 9 Wall. 108.) It is desirable, at least, that the converse rule should be applied, and that a decree void elsewhere should not be held binding there. We are aware that some of the cases which we have cited and others which we have not cited contemplate the possibility of a divorce which shall be valid only as to the plaintiff within the jurisdiction. But especially in this country, where changes of residence from state to state are frequent, every court must strive so far as possible to bring

the local view of a citizen's *status* into accord with that which would prevail generally elsewhere.

We have tried to show that the decree before us would be regarded as void outside the jurisdiction, and void on the ground that the condition precedent attached by a California statute to the right of the court to take jurisdiction had not been complied with. The question is whether the statute has a less effect within the state. No conclusive evidence of the law of California upon this point has been called to our attention. If the plaintiff had been rightly in court, and the objection had been that the defendant had not been duly served, it may be that, if the record showed a proper publication, it could not be contradicted. (*In re Newman*, 75 Cal. 213, 220; 16 Prac. Rep. 887.) But perhaps even this is doubtful in view of some of the decisions earlier cited, and however, it may be, a distinction has been suggested between a total want of jurisdiction and a failure to get jurisdiction of the person of the defendant in a case which is rightly in court. (*People v. Dowell*, 25 Mich. 247, 256.) See *Henderson v. Staniford*, (105 Mass. 504, 506); *Whitwell v. Barbier*, (7 Cal. 54, 63, 64.) We feel at liberty to assume the law of California to be in accordance with that generally received elsewhere, and to consider the question on principle.

The argument for the conclusiveness of the decree in California would seem to be that the parties to a domestic judgment showing jurisdiction on the face of the record cannot impeach it collaterally (*Hendrick v. Whittemore*, 105 Mass. 23; *McCormick v. Fiske*, 138 Mass. 379; Freem. Judgm. §§ 131, 134); and that, if a judgment *in rem* is operative as between the parties, while it stands it must be effectual to determine their *status* as to third persons, although not parties, for reasons already given. (*In re Newman*, 75 Cal. 213, 220; 16 Prac. Rep. 887; *Hood v. Hood*, 110 Mass. 463, 465; *Brigham v. Fayerweather*, 140 Mass. 411, 413; 5 N. E. Rep. 265.)

But if the judgment is thus binding to all intents and purposes in California, it would be binding elsewhere, which

as has been shown, is not the law. In New York this consideration has been adduced as a reason for the rule prevailing there that a domestic record may be impeached collaterally for want of jurisdiction, even by a party. (*Ferguson v. Crawford*, 70 N.Y. 253, 261, 262.) Whether the rule as to parties be regarded as an anomaly established on the principle *communis error facit jus*, or as a mere rule of procedure that those who have it in their power to reverse a judgment must do so if they do not want to be bound by it, as possibly may be inferred from some of the cases (*Hendrick v. Whittemore*, 105 Mass. 23, 28), the conclusion cannot be admitted that those who have not that power are also bound, if the judgment is *in rem*, to admit the change of *status* which it purports to effect. Consider what would be the result.

In a great majority of divorces neither party wishes to disturb the decree. If their acquiescence should be allowed to have the effect supposed, third persons may be affected in their property and in their most sacred personal rights by the interested action of others without ever having a chance to be heard. The cases are few, and we are aware of no binding authority. But in *Perry v. Meddowcroft*, (10 Beav. 122, 137), an infant was allowed to impeach a domestic sentence of nullity collaterally for collusion, although the sentence operated *in rem*, and bastardized him if it stood. (*Harrison v. Southampton*, 22 Law J. Ch. 372; *Meddowcroft v. Huguenin*, 4 Moore P. C. 386, 398.) We cannot doubt that, if the fraud on the court had concerned its jurisdiction rather than the merits, Lord LANGDALE would have been at least equally ready to hear the evidence. (*Cavanaugh v. Smith*, 84 Ind. 380.) Yet the parties to the collusive decree were bound by it. (*Green v. Green*, 2 Gray, 361, 362; *Nichols v. Nichols*, 25 N. J. Eq. 60, 65.) We have confined our citations mainly to cases of divorce and judgments *in rem*. But where there has been an execution sale under a judgment *in personam* there is a difficulty not unlike that which arises with regard to judgments *in rem* in allowing the validity of the judgment to

be disputed by third persons for the purpose of destroying the purchaser's title. Yet it has been held that this may be done. (*Safford v. Weare*, 142 Mass. 231; 7 N. E. Rep. 730.)

We shall not consider further whether this judgment was not absolutely void on the facts reported, and whether, if so, the record could be contradicted by the parties to it on what has been declared in California to be a "fundamental rule that no court can acquire jurisdiction by the mere assertion of it, or by deciding that it has it." (*McMinn v. Whelan*, 27 Cal. 300, 314.)

We are of opinion, for the reasons which we have given, that the validity of the divorce granted Charles W. Adams is open to contradiction in this suit; that the divorce was void and ineffectual as against his legitimate children; that therefore his marriage with the plaintiff's mother was void, and did not legitimate the plaintiff in such a sense as to entitle him to set up a claim in competition with the legitimate children under a Massachusetts will.

Another and distinct argument has been drawn from another California statute, which provides that when a marriage is annulled on the ground that a former husband or wife was living, children begotten before the judgment are legitimate. (Civil Code, Cal. § 84.) The California and Texas statutes also provide that the issue of marriage null in law shall be legitimate. (Civil Code, Cal. § 1387; Rev. St. Tex. § 1656.)

The Texas statute may be laid on one side; for, even if we should hold that the Texas law imparted to the plaintiff his capacity for legitimation, which under the facts of this case we do not intimate, still, subject to the qualifications heretofore stated, the effects of his parents' marriage upon him must be determined by the law of California, where it took place, and where they and he then were domiciled. We lay on one side, therefore, without further remark, a *dictum* in a decision by the Supreme Court of Texas that children born before the parents entered into a void marriage would be legitimate so as to take as children under a Texas will. (*Carroll v. Carroll*, 20 Tex. 731, 745, 746.)

We see no ground for construing the California acts as applying to any children except those born after the void ceremony has been gone through with. They alone can be described as issue of the marriage, according to the express words of section 1387. (*Greenhow v. James*, 80 Va. 636, 638.) They alone fall within the obvious reasons for the statute and the earlier Spanish law from which it would seem that the statute may have been derived, according to the exposition in another Texas case. (*Smith v. Smith*, 1 Tex. 621, 629.) If we assume that section 84 applies where there has been no judgment annulling the marriage, the general words "children begotten before the judgment" must be confined to children born after the marriage, in view of section 1387. Neither section 84, nor section 1387, nor both together, can be taken to enlarge the meaning of section 215, discussed at the beginning of this opinion, so that a void marriage shall legitimate children previously born. The view which we take seems to be that of the Supreme Court of California so far as they have expressed an opinion. (*Estate of Wardell*, 57 Cal. 484, 491. See, also, *Watts v. Owens*, 62 Wis. 512, 517; 22 N. W. Rep. 720; *Fras. Parent & Child*, [2d ed.] 28.) We have found no case favoring a different construction except the few words in *Carroll v. Carroll*, 20 Tex. 731, 746.

Bill dismissed. .

A child legitimate according to the law of its domicile is legitimate everywhere, whether the legitimation be by virtue of the subsequent marriage of its parents, *Birtwhistle v. Vardell*, 7 Cl. & F. 895; *In re Goodmans Trust*, L. R. 17 Ch. D. W. 266; *Miller v. Miller*, 91 N. Y. 315; or by special legislative enactment, *Scott v. Key*, 11 La Ann. 232, and if the subsequent marriage of the parents did not have that effect in the law of the domicile the child is not legitimate elsewhere. *Smith v. Kelly*, 23 Miss. 167, 170.

In *Birtwhistle v. Vardell* (*supra*) the general rule was recognized, but it was held though the personal statute as to legitimacy was fixed by the law of the domicile, such a child could not under the statute of Merton inherit lands in England, that statute limiting the right of inheritance to those born in wedlock. The same doctrine was applied in *Lingen v. Lingen*, 45 Ala. 410; *Wilham v.*

Kimball (Fla.), 16 So. Rep. 783; Smith v. Derr's Admr. 34 Pa. St. 136. But the law has been changed in the last named state by statute. Agnew's Estate, 11 Pa. Co. Ct. 137.

A Scotch marriage duly celebrated between the divorced wife of an Englishman (who was henceforth domiciled in Scotland), did not give to the children of their union the character of "lawfully begotten" so as to enable them to succeed to property in England, for the Scotch divorce had not dissolved the English marriage. Shaw v. Gould and ors. L. R. 3 H. L. 3 Law Rep. 55.

As to legitimation by acknowledgment of father, see Blythe v. Ayers, *infra*; as to legitimacy of descendants of slave marriages, Scott v. Raul, *infra*.

MARY T. GRAHAM vs. BRIDGET FRANCES BURCH.

[47 Minnesota, 171.]

REVOCATION OF WILL — ATTEMPT TO DESTROY — INEFFECTIVE DEED.

Under Gen. St. Minn. 1878, c. 47, § 9, making the burning, tearing, canceling or obliterating of a will effective for its revocation, a will is not revoked by being placed in a stove with kindlings not yet ignited with the intention of destroying it when the fire should be lighted, if it is subsequently, though without the knowledge of testator, removed from the stove while still intact.

No revocation of a will is implied from a subsequent conveyance of the property, which conveyance is set aside as having been obtained by undue influence.

The Minnesota Probate Court has, on an application for the allowance and probate of a will, no jurisdiction except to declare the invalidity of a will, and on appeal to the District Court on an order made on such application that court can exercise only probate jurisdiction, and cannot assume to declare a trust or determine the disposition of the property under the will.

APPEAL from District Court, Ramsey County, to admit will to probate.

John D. O'Brien and Armand Albrecht, for appellant.

Thompson & Taylor, for respondent.

VANDEBURGH, J.—Upon the 8th day of January, 1887, one James Burns, of the city of St. Paul, duly executed and published his last will and testament, whereby he devised his estate, consisting of a lot in the city of St. Paul, with buildings thereon, to his two daughters, who are the parties to this action. Upon his decease Mrs. Burch, the defendant, who is named as executrix in the will, petitioned the Probate Court for its allowance. Her application was denied, and an appeal taken by the executrix to the District Court, where, upon a full hearing, the court reversed the decision of the Probate Court, and directed the will to be admitted to probate. The legal question involved in the case arise chiefly upon the following facts found by the District Court: After the execution of the will, the decedent demanded of Mrs. Burch, who had custody of the will, that it be delivered to him to be destroyed. Upon its delivery to him, he placed it, inclosed in an envelope, in a stove, with kindlings not yet ignited, with the intention of destroying the will by burning, when the fire should be lighted. The facts were found by the court as follows: (1) "This was done in the presence of said Bridget F. Burch, and with the express and actual intention on part of said decedent to destroy said will by burning, when said fire should be lighted. Said decedent then stepped for a moment out of the room, and thereupon said proponent Burch fraudulently, and with the purpose of thwarting the said intention of decedent, and without his knowledge or consent, took the will out of the envelope, and secreted it, leaving the envelope in the stove to all appearance as though it still contained the will. Within two hours thereafter the fire in said stove was lighted, either by said decedent or by said Burch, and said envelope burned. Said will was thereafter kept secreted by said proponent Burch, and the decedent ever after supposed the same had been then and there burned as he intended. Said will was not in fact revoked by any of the methods specified by statute." (2) "That on the 6th day of May, 1887, the deceased, James Burns, executed, acknowledged, and delivered to said

Bridget Frances Burch a deed of conveyance of the northerly seventy-five (75) feet of lot numbered one, (1), in block numbered fifty (50), of Dayton and Irvine's addition to St. Paul, Ramsey county, Minnesota, being the same property given and devised by the decedent to the said Bridget Frances Burch in the third paragraph of the will of the said decedent presented for probate in this proceeding; that said deed was afterwards, in an action brought in this court by said Mary Graham against said Bridget Frances Birch and others for that purpose, set aside upon the ground that the same was procured by reason of undue influence and restraint exercised over said decedent by the said Bridget Frances Burch at the time of the execution thereof, and the judgment of this court in said action was duly entered accordingly." The statutory provisions in respect to the revocation of wills are as follows. Gen. St. 1878, c. 47, § 9: "No will, or any part thereof, shall be revoked unless by burning, tearing, cancelling, or obliterating the same with the intention of revoking it by the testator, or by some person in his presence, or by his direction, or by some will or codicil or other writing signed, attested, and subscribed in the manner provided for the execution of a will; but nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." In this case the purpose of the testator to burn his will is clearly shown, but the will remained intact. It was not scorched or mutilated in any degree. The testator did not persist in carrying out his expressed purpose, nor see to it that it was actually burned, wholly or partially. The acts which the statute declares shall constitute an express revocation were none of them done. If in any case, in the absence of any of the acts specified in the statute, the fraud of the devisee could be held to supply the place of such acts, the record before us perhaps presents such a case. But we cannot vary or dispense with the statutory rule, which the legislature has for wise reasons established, on account of the fraud of an interested party. The statute requires that the

will itself should be destroyed, or bear some marks of defacement or spoliation, manifesting the intent to revoke. The act and intent must concur, and there must be proof of both, though the intent may be inferred from the facts and circumstances. The law will not permit the formalities of the *execution* of a will to be dispensed with because of fraudulent interference, and the same rule must be applied in respect to the statutory requisites of revocation. (4 Kent, Comm. §§ 520, 521.) In *Dan v. Brown* (4 Cow. 483), WOODWORTH, J., says: "There must be a cancelling *animo revocandi*. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation. The statute has prescribed four. If any of them are performed in the slightest manner, joined with a declared intent to revoke, it will be an effectual revocation." (*Gains v. Gains*, 2 A. K. Marsh. 190; *Bibb v. Thomas*, 2 W. Bl. 1043; *Doe v. Harris*, 6 Adol. & E. 209; *Jackson v. Betts*, 9 Cow. 208; *Blanchard v. Blanchard*, 32 Vt. 62.) But the failure to perform some one of the acts designated by the statute cannot be excused, though such formal act of revocation be defeated or prevented by fraudulent devices. (*Kent v. Mahaffney*, 10 Ohio St. 204; *Hise v. Fincher*, 10 Ired. 139; *Malone v. Hobbs*, 1 Rob. [Va.] 346; *Clingan v. Micheltree*, 31 Pa. St. 25; *Gains v. Gains*, *surpa.*)

2. Under the clause saving revocations, "implied by law from subsequent changes in the condition or circumstances of the testator," it is claimed that the conveyance to Mrs. Burch above referred to, and which was set aside by the court, on the ground of undue influence, must be construed as an implied revocation of the will in question. Of course, a sale of the estate devised must operate as a revocation, for the will cannot thereafter take effect on it; and it is admitted that, if the deed had been valid and effectual to convey the premises, it would have worked a revocation; but the respondent insists that the rule is not applicable to a deed adjudged invalid, and not the deed of the grantor, for fraud or undue influence. If, in opposition to the allowance of a will in probate proceedings, a revocation in writ-

ing, executed in due form by the testator, had been produced, clearly the proponent would not be concluded from showing that it was not the voluntary act of the testator, but that it was procured by fraudulent devices and undue influence. *O'Neill v. Farr*, 1 Rich. Law, 80. But we can see no distinction in this respect between such an instrument and a deed which is claimed to work a revocation by implication, if the deed was not the act of the testator, and the existence of the deed is due to fraud and undue influence, especially where, as in this instance, the fact is already adjudicated that the instrument, though in form the testator's deed, is no deed. "Whoever orders it to be delivered up declares it to be no deed," says the chancellor in *Hawes v. Wyatt*, (3 Brown Ch. 156). The general rule is that no revocation can be good which is procured by fraud, or where the testator was unduly influenced to make it. (Schouler Wills, § 184.) It is true, as Chancellor Kent observes (4 Comm. p. 528), that not only contracts to convey, but inoperative conveyances will amount to a revocation if there be evidence of an *intention* to convey. But in such cases, where the title does not in fact pass, the intention must be manifest. Mr. Greenleaf, however, seems to recognize the distinction insisted on by the plaintiff's counsel here (2 Greenl. Ev. § 687), for he says: "The rule [*i. e.*, implied revocation] does not apply to a conveyance which is void at law on account of fraud or covin, yet if the deed is valid at law, but impeachable in equity, it will be held in equity as a revocation;" citing *Simpson v. Walker* (5 Sim. 1). The same distinction is recognized in other English cases, though Lord THURLOW held differently in *Hawes v. Wyatt* (*supra*). And Mr. Redfield, in noticing these authorities (1 Redf. Wills, § 344), is of the opinion that, if the deed in such cases is void, it should not be allowed an incidental operation by way of revocation. In *Smithwick v. Jordan* (15 Mass. 113), a case resembling this on the facts, the court held that a deed found to have been obtained by fraud and imposition, after the execution of the will, was no revocation. In this case the court found that the decedent was

old and feeble, in ill health, and addicted to the habitual use of intoxicating liquors, though not of unsound mind, and that the deed was set aside on the ground that the same was procured by reason of undue influence and restraint exercised over said decedent by the said Bridget Burch, at the time of the execution thereof. The instrument was then adjudged not to have been the act and deed of the testator, because procured by her by undue influence and restraint. She had acquired such dominion over his will as to destroy his free agency, and constrain him to do against his free will what he was unable to refuse. (2 Greenl. Ev. § 688; *Mitchell v. Mitchell*, 43 Minn. 76; 44 N. W. Rep. 885). Had he been mentally incapacitated to execute the deed, there would have been no question as to the rule. He was only partially so, but his imbecility rendered him an easy victim to imposition. We think the same rule ought to apply in each case. There must be *animus revocandi*, and we can recognize no distinction, as respects the question of implied revocation, between the effect of a deed which is executed by a person who has no will, and one whose will is directed by another person. (*Rich v. Gilkey*, 73 Me. 601).

3. It is further insisted that, by reason of the fraud and misconduct of the defendant in preventing the revocation of the will, the court should have adjudged her not entitled to take her distributive share, or that she should be declared a trustee *ex maleficio*, and that it should have been so determined on the appeal in the district court, which, sitting as a court of equity, had full jurisdiction to try and determine the issue. This is an erroneous view of the jurisdiction of the probate court in proceedings for the proof and allowance of a will. The question was considered and determined in *Greenwood v. Murray*, (26 Minn. 260; 2 N. W. Rep. 945), in which it is held that "the probate court has exclusive jurisdiction in the first instance to take proof of wills of real and personal estate. The decree of that court establishing a will is, unless reversed on appeal, conclusive that it was duly executed by the person whose will it pur-

ports to be, and that such person had legal capacity to execute it. But the probate court decides nothing beyond this. The legal effect of the will, or its various provisions, its construction and operation, do not come in question, and cannot be passed upon on an application to admit the will to probate. The probate court does not assume to determine the validity of a devise, but only that the instrument presented for probate was executed as his last will and testament by the testator in the manner prescribed by statute, and that he was legally competent to make a will." Upon appeal from an order of the probate court allowing or refusing the probate of a will, the district court exercises probate jurisdiction to make such determinations as the probate court ought to have made (*Berkey v. Judd*, 31 Minn. 271; 17 N. W. Rep. 618), but no other or greater. It can exercise no original jurisdiction in the premises, and cannot assume, on such appeal, to declare a trust under the will, or to determine the ultimate rights and interests of parties in the estate. The court below, therefore, declined to pass upon the question suggested, and it is not properly before us for our consideration.

Judgment affirmed.

Revocation by conveyance. — A simulated transfer of the property bequeathed does not operate as a revocation of the will. Succession of Blake-more, 43 La. Ann. 845. Nor does a subsequent will executed when a testator is under undue influence. *O'Neill v. Farr*, 1 Rich. (S. C.) 80. Nor an invalid codicil. *Altrock v. Vandenburg*, 25 N. Y. Supp. 851. Nor does a codicil, inoperative because in excess of the power conferred on the testatrix, operate as a revocation of the previous execution of the power by will. *Austin v. Oakes*, 117 N. Y. 577; 23 N. E. Rep. 193. But a subsequent will disposing of all of testator's property does operate as a revocation though some of the bequests are void. *In re Teasele's Estate*, 158 Pa. St. 219; 25 Atl. Rep. 1185.

Objections filed to the probate of a will alleging the conveyance of the property to contestants after the execution of the will, present no ground for contest. *In re Tillman's Estate* (Cal.), 31 Pac. Rep. 563.

In *Austin v. Oakes*, *supra*, the court, referring to *Beard v. Beard*, 3 Atk. 72, in which it was held that a will "made in passion" at a tavern, giving the whole estate to a brother, was revoked by a later deed-poll of the whole estate to the wife, although the deed was inoperative and could not take effect, says: "No such revocation of a will could occur in this state, and our statute was

intended to render such revocations impossible, and condemns the principle upon which they were founded."

But it has been held that a contract inconsistent with the provisions of a bequest operates as a revocation of it. *Walker v. Steers*, 14 N. Y. Supp. 398, *sub nom Saville v. Steers*, 60 Hun, 567 (mem.), and that a deed of the property operates as a revocation of the will though it be not recorded until after the death of the grantor. *Collup v. Smith*, 89 Va. 258; 15 S. E. 584. And even though the property is immediately reconveyed. *Selden v. Pearsall*, 1 N. Y. Leg. Obs. 277. And the reconveyance is by the same instrument. *Walton v. Walton*, 7 Johns. Ch. 258. And an instrument exercising a power of appointment revokes the appointment contained in the will. *Paine v. Forsarth*, 86 Me. 357; 30 Atl. Rep. 11.

Revocation by mutilation.—In *Gay v. Gay*, 60 Iowa, 415; 3 Am. Prob. R. 360, it was held that drawing scrolls through the signature did not operate as a cancellation, though it was intimated that if the scroll had entirely obliterated the signature it might have worked a destruction. Nor does scratching it with a knife unless the signature is rendered illegible. In *re Godfrey*, 69 Law Times, 772.

Mutilation of a will by cutting out a portion of a line, leaving the signature intact and the sense perfectly plain, is not a revocation. *Ramsey's Will*, 2 Pa. Dist. Rep. 425. But cutting out the signature does operate as a revocation or destruction. *Hobbs v. Knight*, 1 Curtels, 768, even though it be gummed back again. *Bell v. Fothergill*, L. R. 2 Prob. S. Div. 148. As does tearing off the seal and part of a word. *Price v. Powell*, 3 H. & N. 341. Cutting out part of the signature and tearing off the seal. *Smock v. Smock*, 11 N. J. Eq. 156; *Re Will of White*, 25 N. J. Eq. 503. Scratching out the signature of the testator and of the attesting witnesses. In *Goods of Merton*, 12 Prob. Div. 141. Drawing lines through the signature. *Re Wood*, 2 Con. 144; 11 N. Y. Supp. 13; *Re Clark*, 1 Tuck (N. Y.) 454; *Re Philp*, 19 N. Y. Supp. 13; *Baptist Church v. Roberts*, 2 Pa. St. 110; *Evan's Appeal*, 58 Pa. St. 238. Or through those of the witnesses. In *Goods of James*, 7 Jour. N. S. 52. Though the lines are made by a lead pencil. *Woodfill v. Patton*, 76 Ind. 575; 2 Am. Prob. Rep. 43; *Townsend v. Howard*, 86 Me. 285; 29 Atl. Rep. 1077. And erasing the signature to a codicil on the same sheet with the will operates in revocation of both codicil and will. *Re Bookman*, 11 Misc. 675; 33 N. Y. Supp. 575.

Under similar statutes particular clauses in a will are not revoked by obliteration. *Lovell v. Quitneau*, 88 N. Y. 277; 2 Am. Prob. R. 451; s. c., 25 Hun, 537, overruling *McPherson v. Clark*, 3 Bradf. 96; *Guegel v. Vollmer*, 1 Dem. 484; *Re Wilcox Will*, 20 N. Y. Supp. 131; *Carver's Estate*, 3 Misc. 567; 23 N. Y. Supp. 753; *Giffin v. Brooks*, 48 Ohio St. 211; 31 N. E. Rep. 743. Erasing the name of a devisee neither a revocation of the will nor the devise. *Clark v. Smith*, 34 Barb. 140. And such erasures and interlineations do not affect the admissibility of the will to probate as originally executed. *Prescott's Will*, 4 Redf. 178.

BARNEY, Respondent, *vs.* HAYS *et al.*, Appellants.

[11 Montana, 99.]

PROBATE — REJECTED WILL WITH CODICIL — DEMURRER TO
ANSWER.

The refusal to admit a will to probate is not a bar to another application for the probate of the same will with a codicil subsequently found, and which, by referring to the will, republishes it.

A demurrer to an answer denying the allegations of the objections filed to a will, cannot be maintained under Probate Practice Act, Montana, §§ 20-22, which provides that the proponent may answer the contestant's grounds and that the issues of fact thus raised must, on the request of either party, be tried by a jury.

APPEAL from judgment District Court, Yellowstone County, refusing to admit to probate the will of Charles E. Barney.

O. F. Goddard and Cullen, Sanders & Shelton, for appellants.

Savage & Day, for respondents.

BLAKE, C. J.—The appellants filed, January 10, 1891, in the District Court of Yellowstone county, their petition for the probate of the last will and testament of Charles E. Barney, deceased, and alleged that said Barney died October 3, 1890, in the state of Vermont; that he left real and personal estate in said county of Yellowstone of the value of \$20,000; that he left a will dated June 15, 1889, which was filed October 11, 1890, in the court below, and presented for probate; that the court, by an order made December 1, 1890, refused to probate the same, and the petitioners appealed to this court; that they were informed in January, 1891, that the said Barney had executed a codicil to said will in August, 1890, and thereupon dismissed their appeal without prejudice; and that said will and codicil are the last will and testament of said Barney. The petition

complies with the statute, and a full recital of the facts is not necessary at this time. The material part of the will, which was published June 15, 1889, is as follows: "I do give and bequeath to my mother, Mary E. Barney, the sum of one thousand dollars. I give and bequeath to my daughter, Ida L. Barney, the sum of one hundred dollars, which said bequest of one hundred dollars shall be paid to my said daughter, Ida L. Barney, out of my estate, first, before the payment of any other bequest herein made. I give, devise, and bequeath to my three brothers and one sister, namely, Rufus H. Barney, Leonard L. Barney, Ward H. Barney, and Ella Barney, all the rest, remainder, and residue of my estate, all and singular, both real and personal, remaining after payment of my just debts, and the first two bequests above made, which remainder of my estate shall be divided amongst my said three brothers and one sister equally."

The appellants were appointed the executors of said will. The deceased person was not married in June, 1889, and had one child, the said Ida L. Barney. Afterwards, in the month of August, 1890, the testator intermarried with Ellen C. Brodie in the state of Vermont, and she is the surviving wife. The codicil above mentioned consists of the following letter, which was written in the state of Vermont in the year 1890, although it purports to be dated in the year 1880: "Keller's Bay, Aug. 18, 1880. Hon. E. N. Harwood, Helena, Mont.: I have not strength to write much, so I will pitch right into my subject, which is somewhat important. I was married nearly two weeks ago. * * * So much explanatory; will enlighten you further on the subject, if you wish, when I see you. Now, what I want is for you to change my will so that she will be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I don't know what the laws are in Montana. I suppose Babcock & Rowley will have to witness the change or codicil. I don't know what ought to be done, but you do. * * * Let me hear from you soon on this subject,

as soon as you can make it convenient. With best wishes, I am, truly yours, CHARLES E. BARNEY."

Said Ida L. Barney filed, February 10, 1891, her written objections to the probate of said will and codicil, and alleged that she is the daughter and only child of the deceased; that, at the time of the execution of the will and codicil, "the said Charles E. Barney was of unsound mind and memory, and not capable of making a will or bequest," and "was acting under duress, menace, and undue influence, and signed the same under such undue influence, duress, and menace;" that the said will was revoked August 9, 1890, by said Charles E. Barney in his lifetime, by his marriage to Ellen C. Brodie, "who thereafter, and up to the time of the death of said Charles E. Barney, was his wife;" that the deceased made no provision for his said wife "by marriage contract, or otherwise, nor has said surviving wife in any manner been provided for in said will, nor is she mentioned therein so as to show an intention not to provide for her;" that said will was presented December 1, 1890, to the said District Court for probate, and by an order the same was refused admission to probate; that said Hays and Rowley appealed to the Supreme Court of this state, and "on their own motion dismissed said appeal;" that said order made December 1, 1890, "is now in full force, and has never been reversed or modified;" that said District Court "has no jurisdiction to hear said petition for the probate of said will a second time, and while its order made as aforesaid is in force, and is not reversed or modified." There is a denial that the said Charles E. Barney ever made or executed any codicil to said will. It is further alleged that said writing, which has been filed as a codicil, "is a positive revocation of said alleged will." "Plaintiff further alleges, on her information and belief, that said paper writing was not signed or written by said deceased; * * * that by reason of the said alleged will being made by said deceased before his marriage with said Ellen C. Brodie as aforesaid, and by reason of the foregoing letter written as alleged by said deceased, said alleged will

became and is revoked, null, and void;" that said Ida L. Barney and Ellen C. Barney are the only heirs-at-law of the deceased. Said Hays and Rowley filed February 20, 1891, their answer to the objections of the said Ida L. Barney, and denied that, at the times specified and aforesaid, "the said Charles E. Barney was of unsound mind and memory," or "was not capable of making a will or bequest, or a codicil thereto," or "was acting under duress, menace and undue influence of any one," or that "he signed the said will or the said codicil thereto under undue influence, duress, or menace." They further denied that the will was revoked by the marriage of said Charles E. Barney with said Ellen C. Brodie, or in any other manner, or that "deceased made no provision for his surviving wife by marriage contract or otherwise," or "that said surviving wife has not been provided for in said will; but the defendants allege affirmatively that the said surviving wife of deceased was expressly provided for in the said codicil to said will." Said Ida L. Barney then filed a demurrer, upon the ground that the answer did not state facts sufficient to constitute a defense to said objections, which was sustained by the court. The defendants elected to stand on their answer, and judgment was entered "that the objections of plaintiff to the probate of said alleged will and codicil are well taken, and that said alleged will and codicil are not, nor is either of them, the last will and testament of the said Charles E. Barney, deceased."

A preliminary question has been suggested by the respondent, who contends that the first decree of the court refusing to admit to probate said will is binding upon all parties until it has been reversed, and that this issue cannot be again litigated. There is no controversy about the correctness of this legal proposition. (*Castro v. Richardson*, 18 Cal. 478; *State v. McGlynn*, 20 Cal. 233; 81 Am. Dec. 118; *Redmond v. Collins*, 4 Dev. 430; 27 Am. Dec. 208; *Schultz v. Schultz*, 10 Grat. 358; 60 Am. Dec. 335.) "The execution of a codicil referring to a previous will has the effect to republish the will, as modified by the codicil."

(Prob. Prac. Act, § 448.) Chief Justice FIELD in *Payne v. Payne* (18 Cal. 302), said: "The codicil refers to the will, and operates as its republication, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil." To the same effect is the statute. "Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument." (Prob. Prac. Act, § 477.) It is evident that the contest, which involved solely the probate of said will in the former proceedings, could not be an adjudication of the matters which are before us.

It will be seen from the foregoing statement that the answer of the appellants to the objections of the contestant raises the following issues of fact: Was the decedent of sound mind and memory, and competent to make said will? Was the decedent at the time of the execution of said will and codicil free from duress, menace, or undue influence? Did the decedent sign or write said codicil? We are not aware of any statute or authority which recognizes the practice of interposing a demurrer to said answer. On the contrary, the duty of the court is declared in definite language in the Probate Practice Act: "The petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving (1) the competency of the decedent to make a last will and testament; (2) the freedom of the decedent, at the time of the execution of the will, from duress, menace, fraud, or undue influence; (3) the due execution and attestation of the will by the decedent or subscribing witnesses; or (4) any other substantial grounds affecting the validity of the will,—must, on request of either party in writing, filed three days prior to the day set for the hearing, be tried by a jury. If no jury is demanded, the court must try and determine the issues joined." Section 20. "When a jury is demanded, * * * the trial must be conducted in accordance with the provisions of the Civil Practice Act for trials of issues of fact. A trial by the court must be

conducted as provided in said Civil Practice Act in cases of trials by the court." Section 21. "The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court; upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it." Section 22. These provisions are strictly pursued, and the Supreme Court of California holds that, "in such a proceeding, the position of the petitioner, and the person who opposes the probate of the will, is different from that of parties to an ordinary civil action,—the contestant is the plaintiff and the petitioner is the defendant." (*Estate of Wooten*, 56 Cal. 325.) Upon the trial, the contestant is limited to the matters which are presented in the written grounds of opposition. (*In re Kile*, 72 Cal. 131; 13 Pac. Rep. 320.) "The jury are to find upon all the issues of fact raised by the contest, and none others." (*Estate of Learned*, 70 Cal. 141; 11 Pac. Rep. 587; *Estate of Dalrymple*, 67 Cal. 444; 7 Pac. Rep. 906.) A general verdict rendered by the jury in lieu of a special finding will not support a judgment denying the probate of a will. (*In re Langan*, 74 Cal. 353; 16 Pac. Rep. 188.)

The respondent claims in this court that these instruments, when examined and construed, are not of a testamentary character; that the issues which have been commented on are irrelevant and immaterial, and therefore there was no error in denying the probate of said will and codicil. It is obvious that the statute, *supra*, and authorities, preclude such a view of the subject. Why did the contestant deliberately file objections embracing matters of this serious nature, if she had in them no confidence? She assumed voluntarily the statutory burden of proving her allegations, which had been made under the sanctity of an oath. In *Estate of Cobb* (49 Cal. 604), Chief Justice WALLACE said: "The instrument offered being evidently of a testamentary character, upon application to admit it to probate the inquiry is only as to the mental condition of the testatrix; whether she was acting under duress, menace, fraud, or undue influence; whether the will was duly exe-

cuted; and the like. The other questions attempted to be raised by the objections filed in the case concern the construction to be placed upon the will, and cannot be considered until it shall have been admitted to probate." The court in *Estate of Sanderson*, (74 Cal. 208; 15 Pac. Rep. 753), said: "In cases of contests of a will, the issues must be such as that the determination of them will leave to the court no office except to enter a judgment admitting the will to probate or rejecting it." The court below overlooked the plain requirements of the statute, *supra*, and deprived the appellants of their right to a trial by the mode which has been pointed out. It would be improper for us to express an opinion upon the interpretation of said will and codicil until the issues of fact have been tried and determined according to law.

It is ordered and adjudged that the judgment be reversed, and that the cause be remanded, with instruction to the court to proceed in accordance herewith.

DE WITT, J., concurs. HARWOOD, J., being disqualified, did not participate in this decision.

Re-execution of will by codicil.—The execution of a codicil which refers to and confirms a will or a former codicil, operates as a re-execution of the will or codicil, supplying all omissions and remedying all defects in the previous execution. *Utterton v. Robbins*, 1 Ad. and El. 423; *Allen v. Maddock*, 11 Moore P. C. 427, aff'g *Maddock v. Allen*, 3 Jur. N. S. 966; *Ingoldby v. Ingoldby*, 4 No. Cas. 498; *Gordon v. Lord Reay*, 5 Sim. 274; *Harvey v. Chouteau*, 14 Mo. 587; *McCurdy v. Neall*, 42 N. J. Eq. 333, 336; 7 Atl. Rep. 566, 567; *Matter of Nisbet*, 5 Dem. 286; *Mooers v. White*, 6 Johns. Ch. 374; *Estate of Masters*, 1 N. Y. Civ. Pro. 459; *Re Storms Will*, 3 Redf. 327.

So that even an unattested will or codicil may be established by a codicil properly executed. *Allen v. Maddock*, *supra*; *Harvey v. Chouteau*, *supra*. And proof of the execution of the codicil supplies the want of proof of the execution of the will. *Caulfield v. Sullivan*, 82 N. Y. 153; 2 Am. Prob. R. 43; *Matter of Nesbit*, *supra*; *Estate of Masters*, *supra*; *Re Storms*, *supra*.

A devise void because made to an attesting witness is validated by a codicil. *Mooers v. White*, *supra*.

A will made under undue influence is free from the taint of fraud by a codicil reaffirming it. *O'Neill v. Farr*, 1 Rich. (S. C.) 80.

In *Brown v. Riggin* (94 Ill. 560; 1 Am. Prob. Rep. 238), it was said of an instruction requiring the jury to find the decedent capable at the several times when the will and codicils were executed, that it was calculated to mislead. If the jury were satisfied of her capability at any one time, it should have validated the act then done and the preceding acts by that means republished. The same principle was applied in *Pope v. Pope* (Ga.) 22 S. E. Rep. 245.

A will revoked but not destroyed is revived by a codicil. *Re Knapp*, 23 N. Y. Supp. 282. So is a will revoked by the marriage of the testator. *Brown v. Clark*, 77 N. Y. 369; 1 Am. Prob. Rep. 510.

The execution of a codicil has been deemed so far a re-execution of the will that the erasure of the signature to the codicil operates as a revocation of both, they being written on the same sheet. *Re Brookman's Will*, 11 Misc. 675; 33 N. Y. Supp. 575.

The execution of a codicil operates as a republication of the will so that land acquired in the meantime passes by the will. *Jones v. Shewmake*, 35 Ga. 151; *Goodtitle v. Meredith*, 2 M. & S. 6; *Van Courtland v. Kip*, 1 Hill, 500; *Kip v. Van Courtland*, 7 id. 346; *Barnes v. Crowe*, 1 Ves. Jr. 486.

Though the language of the will shows an intention that the release to the children for which it provides shall be limited to charges previously made against them, the effect of a codicil as a republication of the will is to make it speak as of the time of the execution of the codicil, and operates to release the children from charges made in the meantime. *Van Alstyne v. Van Alstyne*, 28 N. Y. 375.

W. C. LYNE *et al.* vs. B. H. SANFORD *et al.*

[82 Texas, 58.]

ADMINISTRATION—TIME OF GRANTING—JURISDICTION, PRESUMPTION—ASSETS—LAND CERTIFICATE TO HEIRS—SALE—APPLICATION—COLLATERAL ATTACK—MISNOMER.

In the absence of a statutory limit of time within which administration must be granted, a grant of letters is not void because made more than ten years after the death of the intestate.

The domicile of the intestate in the county in which administration was granted and that he left property in that county, will be presumed on a collateral attack on the order of the county court granting the administration, that court having general jurisdiction concerning the administration of estates.

The certificate for a league and labor of land directed to be issued to the heirs or personal representatives of Willis A. Forris, deceased, under a special act of the legislature which provided that it should be in force only if the party has not heretofore received his headright, was assets of the estate and not a gratuity to the heirs, it being apparent that the grant was a recognition of a right existing in the decedent by his compliance with statutory requirements. The commissioner of the general land office had under the act no discretionary authority to issue the certificate to the heirs so as to vest title to it in them as against the administrator, his duty being merely ministerial.

The purchaser of such certificate at a sale by the administrator of Willis A. Farris, as the property of Farris, acquires good title, though in the act of the legislature and in the certificate the name is spelled "Forris," the identity of the two names being apparent.

The facts that the certificate had not actually been issued when the order for the sale was made and was not inventoried as assets are immaterial, the right to the certificate under the act previously passed existing and having been issued.

Objections that no notice was given of an application for leave to sell land for the payment of the debts or of the sale that the application shows no cause for administration and no reason for the sale; that the sale was fraudulent and that the claim for the payment of which the sale was had, was barred on its face by the statute of limitations; that no exhibit was attached to the application showing the condition of the estate, are not available on a collateral attack on the title of the purchaser at the sale.

An application for an order to sell land to pay a specified claim, and the order for the sale granted thereon are equivalent to an allowance of the claim by the administrator and its approval by the court.

COMMISSIONERS' DECISION. Section B. Appeal from District Court, Clay County; P. M. STINE, Judge.

Action by W. C. Lyne and others against B. H. Sanford and others.

Judgment for defendants. Plaintiff's appeal.

A. K. Swan, H. N. Atkinson, and J. E. Bomar, for William and Sue Lyne, appellants.

Davis & Harris, for appellees.

FISHER, J.—This is a suit of trespass to try title, instituted in the District Court of Clay county, August 30, 1888, by appellants against the unknown heirs of C. P. Runnell and the unknown heirs of B. E. Sanford and William Weaver. The land in controversy, as claimed in the origi-

nal petition, was patented to the heirs of Willis Farris. The Sanford heirs answered and disclaimed as to all of the land sued for except a designated 1,505 acres. The Sanford heirs pleaded not guilty as to the 1,505 acres. Weaver, by answer, disclaimed as to the land sued for, except 320 acres, which he claimed by limitation. The plaintiffs at this stage of the case filed their first amended petition, seeking recovery only against the Sanford heirs (naming them), and against Weaver for the land claimed by them in their respective answers. The case below was tried before the court without a jury, and judgment was rendered in favor of the defendants. It is admitted that the judgment is correct as to the defendant Weaver, he being entitled to the 320 acres set up in his answer under his pleas of limitation. It is agreed that appellants are the heirs of Willis A. Farris, deceased, and it is also agreed that the defendants Sanford are the heirs of B. E. Sanford, and they have a regular chain of title from William H. Stubblefield down to themselves for the 1,505 acres of the Farris survey, as set up in their answer.

February 11, 1850, the legislature passed an act for the relief of the heirs and legal representatives of Willis A. Farris, deceased. As the construction of this act is before us for our consideration we will set it out in full. "Section 1. Be it enacted by the legislature of the state of Texas, that the commissioner of the general land office be and is hereby required to issue a certificate for one league and labor of land to the heirs or legal representatives of Willis A. Farris, deceased, and that the same be located, surveyed, and patented on and to any of the vacant and unappropriated lands of this state; provided, however, this act shall only be in force and effect if the party has not heretofore received his headright."

The act took effect from and after passage.

In obedience of this act, the commissioner of the general land office on April 15, 1852, issued to the heirs of Willis A. Farris a certificate for a league and labor of land. This certificate was located on the land in controversy, and the

patent was issued to the heirs of Willis A. Farris, August 14, 1855. William H. Stubblefield, from whom the defendants deraign title, purchased the certificate at an administrator's sale on the first Tuesday in May, 1852, from David Y. Portis, the administrator of the estate of Willis A. Farris. It appears from the record that January 26, 1852, David Y. Portis presented his application in the Probate Court of Austin county, asking that he be appointed administrator of the estate of Willis A. Farris, who died intestate in the year 1841, and at the time largely indebted to the estate of John Cummings, and left no property except a claim to headright of a league of land. At the time of his death Farris was a citizen of Texas. At the February term, 1852, of the court, Administration was granted on the estate Willis A. Farris, and Portis appointed administrator. March 29, 1852, Portis qualified as administrator of the estate by executing the required bonds and making oath as required by law. On the same day the court appointed appraisers to make inventory of the property of the estate, who upon that day, together with the administrator, returned an appraisement and inventory of the property of the estate as "a certificate for one league and labor of land to be issued by the commissioner of the general land office to the legal representatives of said Farris," which the appraisers valued at \$500. March 29, 1852, Portis, as administrator, makes his application to the court, in which he asks for an order of sale of the claim for a headright certificate of a league and labor of land to be issued under special act of the legislature, and that this is all of the property of the estate of Farris. The sale is asked for the purpose of paying a claim held by Portis belonging to the estate of John Cummings, deceased, against Farris for the sum of \$2,600, and that the claim was in the shape of a mortgage on the headright of Farris, located in Bexar county, and that the mortgage was sent to Bexar county for registration, but neither the mortgage nor the record thereof can be found. The application further states that the headright of said Farris was rejected by the board of

traveling land commissioners, and that the special act of the legislature was passed at the special instance of the applicant. The application further states that there are no funds of the estate to meet the costs and expenses of administration. On March 29, 1852, the court heard the application, and ordered the sale of the headright certificate of Willis A. Farris for one league and labor of land. The order requires the certificate to be sold at public outcry to the highest bidder, on a credit of twelve months. After due notice, October 26, 1852, the administrator made his report of the sale certificate in obedience to the order, after giving legal notice. That the certificate was sold on the first Tuesday in May, 1852, to W. H. Stubblefield on a credit of twelve months, for the sum of \$700, his being the highest and best bid. At the October term, 1852, the court confirmed the sale of the certificate, and order recites that the administrator had made a deed to Stubblefield, which the court approves. May 10, 1852, Portis as administrator of the Farris estate, executed a deed to Stubblefield conveying the certificate. Appellants contend that this administration and sale of the certificate is void, and conveyed no title to Stubblefield in the land by reason of his purchase of the certificate :

“(1) Because the grant of the certificate and the certificate itself, located upon the land sued for, was to heirs of Willis A. Forris, and the administration was upon the estate of Willis A. Farris, and the certificate sold to Stubblefield was the headright of Willis A. Farris, and not Willis A. Forris.” We believe the names Farris and Forris are *idem sonans*. (16 Amer. & Eng. Enc. Law, pp. 122-124.) But, however this may be, it is reasonably apparent that Willis A. Forris and Willis A. Farris is the name applying to the same person, and that the spelling of the name differently arose out of errors and mistakes committed in preparing the certified copies of the instruments and records from the secretary of state's office and the land office that are in evidence in the case. In the certified copies of the records offered in evidence by plaintiff the

name appears Forris. In the certified copies introduced by defendant the name is spelled Farris.

“(2) Because it does not appear that Farris died in Austin county, or had any assets or property there, and, therefore, the court had no jurisdiction to grant the administration.” The County Court of Austin county had general jurisdiction concerning the administration of estates. Nothing to the contrary appearing upon the record, it will be presumed, when its judgments are collaterally attacked, that it found the facts to exist that would give it jurisdiction.

“(3) That the order of sale was obtained and the sale of the certificate made without notice being given beforehand.” These objections are only available in a direct proceeding, and cannot be urged when the sale is collaterally questioned. (*Hurley v. Barnard*, 48 Tex. 87; *Heath v. Layne*, 62 Tex. 691; *George v. Watson*, 19 Tex. 368.)

“(4) That the application shows no cause for administration and no reason for a sale of the certificate.” The application shows that the estate was indebted, and asks for sale of certificate for the purpose of paying debts. Whatever may be the object in the application in this respect, the objections cannot be heard in this case. (*Hurley v. Barnard*, 48 Tex. 87.)

“(5) That the certificate was sold before the claim of Cummings’ estate was presented and allowed.” The application for order of sale sets out this claim, and asks that the certificate be sold for the purpose of paying the debt. The court grants the order of sale as asked. The application for order of sale was made by the administrator. This is tantamount to an allowance of the claim by the administrator and an approval by the court. (*Allen v. Clark*, 21 Tex. 405.)

“(6) That the administration and sale of certificate was fraudulent, and that the Cummings claim was barred on its face, and as a debt it would not support an administration.” These are proper objections to be urged in a direct attack upon the administration, but cannot be

heard in this case. (*Firebaugh v. Ward*, 51 Tex. 414; *Capt v. Stubbs*, 68 Tex. 223; 4 S. W. Rep. 467.)

"(7) That the application for sale was not accompanied by an exhibit under oath of the condition of the estate, showing what debts had been allowed." A failure to attach such exhibit would not render the sale void. A sworn appraisement and inventory was made before sale, showing the condition of the estate. *Finch v. Edmonson* (9 Tex. 504) and *Miller v. Miller* (10 Tex. 333) are relied upon by appellants as authority. The first case is questioned in *Hurley v. Barnard* (48 Tex. 87) and is impliedly overruled in *Heath v. Layne* (62 Tex. 692). The latter case is explained by *Allen v. Clark* (21 Tex. 405) and the expressions in the opinion that support the contention of appellants are disproved.

"(8) That the certificate was not in existence at the time the order of sale was made, and was not inventoried as assets of the estate." The special act of the legislature was in existence at the time the order was made granting the right to sell the certificate, and the certificate was issued before the sale. The right of Farris' estate flowed from the act of the legislature, and was at the time of the order an existing right.

"(9) That the administration, being granted on Farris' estate more than ten years after his death, was void." This objection is not tenable. This was the first grant of administration upon Farris' estate. The then existing law did not fix a time when administration should commence after the death of the intestate. (*Martin v. Robinson*, 67 Tex. 375; 3 S. W. Rep. 550.) The sale and order of sale are not subject to collateral attack for this reason.

"(10) That the certificate was not assets of the estate of Farris, but the property of the heirs of Farris; therefore, not subject to the administration, for the reason that it was a donation to the heirs under the special act of the legislature." By reference to the special act, it will be seen that the legislature in granting this certificate recognized that Willis A. Farris had, before his death, earned the right to

a headright certificate of a league and labor, and in recognition of this right they granted to his heirs or legal representatives the certificate, if he had not heretofore received his headright. The terms of this act clearly imply that the consideration that moved the legislature to grant the certificate was the right existing in Farris by reason of his having complied with the laws under which the certificate was earned. If this was the purpose of the legislature, the grant cannot be regarded as a gratuity or donation to the heirs. (*Hill v. Kerr*, 78 Tex. 218; 14 S. W. Rep. 566; *Rogers v. Kennard*, 54 Tex. 34.)

“(11) That the special act granting the certificate required the commissioner of the general land office to issue to the heirs or legal representatives the certificate, and the certificate being issued by him to the heirs was the exercise of a discretionary act upon his part, and so issuing vested the absolute title in the heirs.” There is nothing in the special act that confers the right upon the commissioner to decide which class of persons mentioned in it shall be entitled to the certificate. The act that granted the right directed the title, and the commissioner had no power to divert it. His duty was simply ministerial. He had no authority to pass upon the rights of the claimants to the certificate so as to conclude them. The issuance of the certificate to the heirs does not make it their individual property, but the certificate is subject to the payment of their deceased ancestor’s debts, and is assets of his estate.

We find no error in the judgment, and report the case for affirmance.

PER CURIAM.—Affirmed as per opinion of commission of appeals.

Time of Administration.—No time is prescribed at common law within which administration must be sought. *Townsend v. Townsend Exr.* 4 Cold (Tenn.), 70; *White v. Ray*, 4 Ired. (N. C.), 14, and in the absence of statutory

regulation a reasonable time will be allowed. *Todhunter v. Stewart*, 39 Ohio St. 181.

In some states the time in which original administration can be granted is limited by statute. In Connecticut this period is seven years, except where the distributees are under disability. *Goodman v. Russ*, 14 Conn. 210; *Lawrence's Appeal*, 49 Conn. 411. In Massachusetts it is twenty years (*Wales v. Willard*, 2 Mass. 120), unless property of the intestate accrues or is discovered after that time, in which case five years after the discovery or accrual is allowed. *Parsons v. Spaulding*, 180 Mass. 88. In Tennessee it is twenty years. *Townsend v. Townsend's Exr.* 4 Cold (Tenn.), 90; *Rice v. Henly*, 90 Tenn. 69; 15 S. W. Rep. 758; except to distributees under disability at the time of the death, and, as to such persons it is thirty years. *Id.* In Texas, four years. *Cochran v. Thompson*, 18 Tex. 652; *Lloyd v. Mason*, 38 Tex. 212; *Duncan v. Veal*, 49 Tex. 408. In Pennsylvania, twenty-one years. *Foster v. Commonwealth*, 35 Pa. St. 148. In Kentucky, twenty years. *Anderson v. Smith*, 3 Met. 491.

Letters of administration granted after the expiration of the statutory time have been held to be absolutely void. *Wales v. Willard*, 2 Mass. 120. But are also said not to be absolutely void. *Foster v. Commonwealth*, *supra*. And on collateral attack will be presumed to have been authorized and properly granted. *Rice v. Henly*, *supra*; *Cochran's Admr. v. Thompson Admr.*, *supra*.

TILDEN vs. GREEN AND OTHERS.

[180 New York, 29.]

TRUST — INDIVISIBLE SCHEME — POWERS — INDEFINITENESS — CY PRES — EXECUTORY DEVISE.

The trust sought to be created by a will, giving the residuary estate to executors as trustees and to their successors in trust during a period not exceeding two specified lives in being, to apply the same and the proceeds thereof to the objects and purposes specified in another clause by which the trustees were requested to procure the incorporation of a certain institution, and in case such institution was incorporated during the lifetime of the survivor of the two lives, authorizing the trustees to convey and apply to its use said residuary estate, "or so much thereof as they may deem expedient;" but in case the institution should not be so incorporated, or if for any cause or reason the trustees should not deem it expedient to so convey or apply said residue, or any part thereof, authorizing them to apply the whole or such portion thereof as was not so applied "to such charitable educational purposes" as in their judgment would render it most widely and substantially beneficial to mankind, cannot be upheld as

constituting primarily a separate trust or power in trust for the benefit of the institution, with an alternative ulterior provision to be effectual only in case the executors deemed it inexpedient to apply the residue to the corporation there being but a single indivisible scheme, with a preference for the institution as an instrument to execute the donor's purpose, leaving the choice to the executors.

It is invalid as a trust because of the indefiniteness and uncertainty of its objects and purposes.

It is invalid as a power because, though imperative, the class in whose favor it is to be exercised is not designated with such certainty as to confer enforceable rights on any person or body.

The doctrine of "cy pres," as applied to gifts for charitable purposes where no beneficiary is named, has no place in the jurisprudence of New York.

Though a valid gift in the nature of an executory devise may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time limited for the vesting of future estates, the gift to the institution in this case cannot be upheld as such an executory devise, for the institution would take, not by virtue of the will, but under the exercise of the discretion of the trustees.

APPEAL from Supreme Court, general term, first department.

Action by George H. Tilden against Andrew H. Green, John Bigelow and George W. Smith, as executors and trustees under the last will and testament of Samuel J. Tilden, deceased, and others, for the construction of such will. The judgment of the special term sustaining the will was reversed by the general term, and defendants appealed to this court.

James C. Carter, Daniel C. Rollins and Geo. F. Comstock,
for appellants.

Joseph H. Choate, Delos C. McCurdy and Lyman D. Brewster, for respondent.

BROWN, J.—Samuel J. Tilden died in August, 1886, leaving a last will and testament dated in April, 1884. He left surviving him, as his only next of kin and heirs-at-law, one sister, two nephews, one of whom is the plaintiff in this action, and four nieces. The defendants Bigelow, Green and Smith were by the will appointed the executors

thereof and trustees of the trusts therein created, and, the will having been duly admitted to probate in October, 1886, they immediately qualified, and entered upon the discharge of their duties as such. This action was brought to obtain a construction of the will. By the complaint the 33d, 34th and 35th articles were assailed as being invalid, but upon the trial no question was raised to the two first named, and no determination in respect thereto was made.

The Supreme Court held that the effect of the 35th and 39th articles of the will was to create one general trust for charitable purposes, embracing the entire residuary estate, and vest in the trustees a discretion with respect to the position of such estate by them. That the testator did not intend to and did not confer upon any person or persons any enforceable right to any portion of said residuary estate, and did not designate any beneficiary who was or would be entitled to demand the execution of the trust in his or its behalf, and declared the provision of the will relating to the disposal of the residuary estate for such reasons illegal and void.

It is essential to a proper understanding of the will to read the two articles above named together, and they are here quoted, the last being placed first.

"Thirty-ninth. I hereby devise and bequeath to my said executors and trustees, and to their successors in the trust hereby created, and to the survivors or survivor of them, all the rest, residue and remainder of all the property, real and personal, of whatever name or nature, and wheresoever situated, of which I may be seized or possessed, or to which I may be entitled at the time of my decease, which may remain after instituting the several trusts for the benefit of specific persons; and, after making provision for the specific bequests and objects as herein directed, to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created, and the survivors or survivor of them in trust, to possess, hold, manage and take care of the same during a period not exceeding two lives in being; that is to say, the lives of my niece

Ruby S. Tilden, and my grandniece Susie Whittlesey, and until the decease of the survivor of the said two persons, and, after deducting all necessary and proper expenses, to apply the same, and the proceeds thereof, to the objects and purposes mentioned in this, my will." "*Thirty-fifth.* I request my said executors and trustees to obtain, as speedily as possible, from the legislature an act of incorporation of an institution to be known as the 'Tilden Trust,' with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number; and in case said institution shall be incorporated in a form and manner satisfactory to my said executors and trustees during the lifetime of the survivor of the two lives in being upon which the trust of my general estate herein created is limited, to wit, the lives of Ruby S. Tilden and Susie Whittlesey, I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey or apply to the use of the same the rest, residue and remainder of all of my real and personal estate not specifically disposed of by this instrument, or so much thereof as they may deem expedient, but subject, nevertheless to the special trusts herein directed to be constituted for particular persons, and to the obligations to make and keep good the said special trusts, provided that the said corporation shall be authorized by law to assume the obligations. But in case said institution shall not be so incorporated during the lifetime of the survivor of the said Ruby S. Tilden and Susie Whittlesey, or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey said rest, residue and remainder, or any part thereof, to apply the same, or any part thereof, to said institution, I authorize my said executors and trustees to apply the rest, residue and remainder of my property, real and personal, after making good the said special trusts herein directed to

be constituted, or such portion thereof as they may not deem it expedient to apply to its use, to such charitable, educational and scientific purposes as, in the judgment of my said executors and trustees, will render the said rest, residue and remainder of my property most widely and substantially beneficial to the interests of mankind."

On March 26, 1887, subsequent to the commencement of this action, the legislature passed an act incorporating the "Tilden Trust," and authorizing it to establish and maintain a free library and reading-room in the city of New York. The institution was organized, and the executors and trustees made to it a conveyance of the residuary estate, and the conveyance was formally accepted by the trustees thereof.

The law is settled in this state that a certain designated beneficiary is essential to the creation of a valid trust.

The remark of Judge WRIGHT, in *Levy v. Levy* (33 N. Y. 107), that "if there is a single postulate of the common law established by an unbroken line of decisions, it is that a trust, without a certain beneficiary who can claim its enforcement, is void," has been repeated and reiterated by recent decisions of this court (*Prichard v. Thompson*, 95 N. Y. 76; *Holland v. Alcock*, 108 N. Y. 312; 16 N. E. Rep. 305; *Read v. Williams*, 125 N. Y. 560; 26 N. E. Rep. 730), and the objection is not obviated by the existence of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain who were the objects of the power.

The equitable rule that prevailed in the English Court of Chancery, known as the *cy pres* doctrine, and which was applied to uphold gifts for charitable purposes when no beneficiary was named, has no place in the jurisprudence of this state. (*Holmes v. Mead*, 52 N. Y. 336; *Holland v. Alcock*, *supra*.)

If the Tilden Trust is but one of the beneficiaries which the trustees may select as an object of the testator's bounty, then it is clear and conceded by the appellants that the

power conferred by the will upon the executors is void for indefiniteness and uncertainty in objects and purposes. The range of selection is unlimited. It is not confined to charitable institutions of this state, or of the United States, but embraces the whole world. Nothing could be more indefinite or uncertain, and broader and more unlimited power could not be conferred than to apply the estate to "such charitable, educational and scientific purposes as in the judgment of my executors will render said residue of my property most widely and substantially beneficial to mankind."

"A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man." (Perry, Trusts, § 637.)

Unless, therefore, within the rules which control courts in the construction of wills, we can separate the provision in reference to the Tilden Trust from the general direction as to the disposition of the testator's residuary estate, contained in the last clause of the thirty-fifth article, and find therein that a preferential right to some or all of such estate is given to that institution when incorporated, and one which the court at the suit of said institution, could enforce within the two lives which limit the trust, we must, within the principle of the cases cited, declare such provision of the will invalid, and affirm the judgment of the Supreme Court. The appellants claim that the power conferred upon the executors to endow the Tilden Trust may be upheld independent of the invalidity of the power given to apply the estate to such charities as would most widely benefit mankind.

The proposition is that by the thirty-fifth article the testator made two distinct alternative provisions for the disposition of his residuary estate. The primary, for the incorporation and endowment of the Tilden Trust; the other ulterior, and to be effectual only in case the executors deemed it inexpedient to apply the residue to that corporation; and it is claimed that this provision of the will con

stitutes a trust to be executed for the benefit of the Tilden Trust, or confers upon the trustees a power in trust, or that it constitutes a gift in the nature of an executory devise.

The latter proposition rests upon the assumption that there is by the will a primary gift, complete and perfect in itself, to the Tilden Trust, that vests the title in that corporation immediately upon its creation.

That a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates, is not denied. (Perry, Trusts, p. 372, § 736.

That question was decided in *Inglis v. Trustees Sailor's Snug Harbor* (3 Pet. 99), and in *Burrill v. Boardman* (43 N. Y. 254).

In those cases the gift was treated as in the nature of an executory devise, dependent upon the incorporation of the institution contemplated by the will, and which would vest upon the occurrence of that event.

But, in view of the language of the will before us, that proposition cannot be maintained here.

By an executory devise, a freehold was limited to commence in the future, and needed no particular estate to support it. It arose upon the happening of a specified event, and the fee descended to the heir-at-law until the contingency happened. By our Revised Statutes executory devises are abolished, and expectant estates are substituted in their place, and such estates, when the contingency happens upon which they are limited, vest by force of the instrument creating them, and this right in the expectant cannot be defeated by any person. But the testator here intended not to create such an estate. The Tilden Trust takes nothing by virtue of the will. The residuary estate is vested in the trustees, or intended to be, and it is solely by their action that it is become vested in the Tilden Trust.

It is only in case that the executors deem it expedient so to do that they are to convey the whole or any part of the

residue to the Tilden Trust. Whether that corporation should take anything rested wholly in the discretion of the executors, as the expediency or in expediency of an act is always a matter of pure discretion. (2 Perry, Trusts, §§ 506, 507.) Every expression used in the will indicates the bestowal of complete discretionary power to convey or not to convey, and the creation and bestowal of such a power in the executors is wholly opposed to and fatal to the existence of an executory devise.

In this respect the case differs from those cited.

In *Inglis v. Sailor's Snug Harbor*, there was no trust created, no discretion vested in the executor, no conveyance to be made after the testator's death. His intention to give his property to a corporation to be created to carry out his charitable purpose was clear. Such was the fact, also, in *Burrill v. Boardman*.

By the will in that case the property was given directly to the corporation, which the testator contemplated should be created after his death. No trust was created, and no discretion was bestowed upon the executors to determine whether the corporation should or should not have it.

Once created, the property, by force of the will, vested in the corporation. The only similarity between that case and this is that the trustees there, as here, were directed to apply to the legislature for an act of incorporation. In case the legislature refused to grant a liberal charter, then the trustees were directed to pay over the estate to the government of the United States.

But no discretion was given the executors to determine upon any event whether or not the corporation, once created, should take the property.

"Nothing," said Chief Justice CHURCH, "can be more certain than that the testator designed that the title to the funds or property in the possession of the trustees or elsewhere, which was included in the residuary clause, should vest in the corporation immediately upon its creation."

"An application was to be made to the legislature after

the testator's death, for a charter. If obtained, the bequest would take effect; if not, it would go to the ulterior donee. If the corporation applied for and granted should not be liberal, and in accordance with the provisions of the will, the ulterior donee or next of kin could challenge its right to take the bequest. It would then become a judicial question." So, clearly, no question in that case was left to the judgment of the trustees. They were not to determine, even, whether the charter was a liberal one. That was a question for the court, that would have been decided in any contest over the property between the corporation and the next of kin or ulterior donee. A discretionary power in executors or trustees was not, therefore, an element in the *Burrill* Case. Not so here. Here we have the unlimited authority delegated to the executors to withhold the entire property from the corporation, if they chose so to do. There the corporation, once created, was vested immediately, by force of the will, with the title to the property. Here, although the corporation may be created in a form and manner satisfactory to the trustees, it takes nothing unless the executors, considering every cause and reason, deem it expedient to convey to it some or all of the residuary estate.

In the *Burrill* Case the testator made a direct gift to a designated beneficiary, the Roosevelt Hospital. In this case Mr. Tilden gave nothing to the Tilden Trust, but simply authorized his executors to endow it if, in their judgment and discretion, they should deem it expedient. Moreover, after creating numerous special trusts, and setting apart portions of his real estate for such several special trust funds, the testator, by the thirty-ninth article of the will, gives the whole of the residuary estate to the executors, in trust for the purposes mentioned in the thirty-fifth article, bestowing upon them, so far as language could do so, the title to all the property, to be held and possessed during the lives of his niece Ruby S. Tilden, and his grandniece Susie Whittlesey, and which he denominated the "general trust" of his estate. He clearly intended by this provision to

create an active trust in his whole residuary estate, and to give to his executors a discretionary power to give such part of it as they deemed expedient to the Tilden Trust, or to withhold all from it. Having intended to convey, so far as he was able to do, the title to his whole estate to trustees, nothing was left that could be the subject of a gift to the Tilden Trust.

We come, therefore, to the consideration of the question whether the thirty-fifth article can be upheld as constituting a separate trust or power in trust for the benefit of the Tilden Trust.

The affirmative of this question can be maintained only by considering the direction to convey to the Tilden Trust as a power separate by itself, and distinct and independent from the power to convey to such charitable purposes as in the judgment of the trustees would be most widely and substantially beneficial to mankind.

The latter provision is eliminated from the will altogether by the appellants, and then the instrument is construed as if the eliminated provision had never existed.

The appellants invoke the aid of the principle that where several trusts are created by a will, which are independent of each other, and each complete in itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trusts may be cut off, and the legal ones permitted to stand.

This rule is of frequent application in the construction of wills, but it can be applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property.

The rule, as applied in all reported cases, recognizes this limitation, that when some of the trusts in a will are legal, and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated, if one portion was retained and other portions rejected, or if manifest injustice

would result from such construction to the beneficiaries or some of them, then all the trusts must be construed together, and all must be illegal, and must fall. (*Manice v. Manice*, 43 N. Y. 303; *Van Schuyver v. Mulford*, 59 N. Y. 426; *Knox v. Jones*, 47 N. Y. 389; *Benedict v. Webb*, 98 N. Y. 460; *Kennedy v. Hoy*, 105 N. Y. 135, 11 N. E. Rep. 390). The cases cited fairly illustrate the practical application of this rule by the courts.

In *Knox v. Jones*, the testator created one trust to receive and pay over the income of his estate to his brother for his life, and then to his sisters, with cross-limitations over as between them, the remainder to the children of his sister Georgiana, and, in default of children, to Columbia College. This court held the whole trust invalid, and refused to sustain the provision in behalf of the testator's brother, on the ground that there was but a single trust, which provided for all the beneficiaries, and that they were all embraced in a common purpose; that the several provisions of a single trust could not be severed, and those that violated the statute against perpetuities dropped, and the others sustained. In *Van Schuyver v. Mulford*, a gift to the testator's wife of the rents and income and profits of the estate during life was upheld, and declared to be valid, although the devise over might be void, on the ground that the gift to the wife was separate and distinct from the other provision of the will, and had no effect beyond her life or upon the ultimate disposition of the estate.

In *Benedict v. Webb*, the testator created separate trusts in two-thirds of his estate for the benefit of his four children. Three of the trusts were held to be valid and one invalid, on the ground that the trust term transgressed the statute. But the court refused to sustain the valid trusts, on the ground that to do so would defeat the intention of the testator in the disposition of his property, and work injustice among the beneficiaries by permitting three of the children to take under their respective trusts, and also as heirs-at-law in the one-fourth as to which the trust was declared invalid.

The result of these and all other cases is that, in applying the rule invoked by the appellants, which permits unlawful trusts to be eliminated from the will, and those that are lawful to be enforced, we must not violate the intention of the testator, or destroy the scheme that he has created for the disposition of his property.

We may enforce and effectuate his will, and give full effect to his intent, provided it does not violate any cardinal rule of law; but we cannot make a new will, or build up a scheme, for the purpose of carrying out what might be thought was or would be in accordance with his wishes.

At the threshold of every suit for the construction of a will lies the rule that the court must give such construction to its provisions as will effectuate the general intent of the testator, as expressed in the whole instrument. It may transpose words and phrases, and read its provisions in an order different from that in which they appear in the instrument, insert or leave out provisions, if necessary, but only in aid of the testator's intent and purpose. Never to devise a new scheme or to make a new will.

The fact that the executors of the will applied to the legislature, and procured the incorporation of the Tilden Trust in a form and manner satisfactory to themselves, and have deemed it expedient to convey to it the whole residuary estate, and have executed a conveyance thereof, is not a matter for consideration in this connection. This point was considered in *Holland v. Alcock*, and in *Read v. Williams, supra*, and it was held that the validity of the power depended upon the nature, and not on its execution. In the latter case the testator bequeathed the residue of his estate "to such charitable institutions and in such proportion as my executors, by and with the advice of my friend Rev. John Hall, D. D., shall choose and designate." And prior to the commencement of the action the executors, with the advice of Dr. Hall, made a written choice and designation of certain incorporated institutions existing under the laws of this state, among whom they directed the residuary estate to be divided. The fact of the selec-

tion was not deemed material, and the will was declared invalid.

The rights of heirs and next of kin exist under the statutes of descent and distribution, and vest immediately upon the death of the testator.

If the trust or power attempted to be created by the will, or the disposition therein made, is valid, their rights are subject to it; but, if invalid, they immediately become entitled to the property. Hence the existence of a valid trust is essential to one claiming as trustee to withhold the property from the heir or next of kin. What a trustee or donee of a power may do becomes, therefore, immaterial. What he does must be done under a valid power, or the act is unlawful. If the power exercised is unauthorized, the act is of no force or validity. In such case, there is no trust or power. There is nothing but an unauthorized act, ineffectual for any purpose.

It is not deemed material to the decision of the question now under consideration whether the provisions of the will relating to the residuary estate are regarded as constituting a trust or a power in trust, except so far as that fact may be indicative of the testator's intention.

If there was a trust, then the executors took title to the residuary estate, but if there is created a valid power in trust, it will be executed with substantially the same effect as if the will created a trust-estate. But section 58 of the statute of uses and trusts, which declares that when an express trust is created for any purpose not enumerated in the foregoing sections, no estate shall vest in the trustees, but the trust, if directing the performance of an act which may be lawfully performed under a power, should be valid as a power in trust, is not, of course, susceptible of the construction that a trust, invalid because in conflict with some cardinal rule of law, could be upheld as a power.

Every trust necessarily includes a power. There is always something to be done to the trust property, and the trustee is empowered to do it, and, if the trust is invalid because the power to dispose of the property is not one that

the law recognizes, it cannot be upheld as a power in trust. The rules applicable to the execution of trusts in this respect are equally applicable to the execution of powers, and as it is of no particular importance in this case in whom the title to the residuary estate is vested, it is not material to the decision whether the provisions of the will are examined as a trust or as a power in trust. The purpose of the trust is lawful, and personal property which constitutes the greater part of the testator's estate was a proper subject of the trust that testator intended, and if it is invalid, it is because the power conferred on the trustees for the disposal of the estate is so uncertain and indefinite that its execution cannot be controlled or enforced by the courts.

In *Prichard v. Thompson*, the legal title to the fund was vested in the executors in trust. In *Read v. Williams*, the executors were given a power in trust. But the court said there was in that respect no legal distinction, and the power in the latter, as the trust in the former case, was declared invalid.

But the nature of the estate which the testator intended to convey to his trustees, and the nature of the power intended to be delegated to them, is of importance in ascertaining his intent, and determining what was the scheme he had for the disposal of his property. By our Revised Statutes, (volume 1, p. 733), powers as they existed by the common law were abolished, and thereafter their creation, construction, and execution were to be governed by statute. They are classified as general and special, beneficial and in trust. A beneficial power is one that has for its object the grantee of the power, and is executed solely for his benefit. Section 79. Trust powers, on the other hand, have for their object persons other than the grantee, and are executed solely for the benefit of such other persons. Sections 94, 95. Trust powers are imperative, and their performance may be compelled in equity, unless their execution or non-execution is made expressly to depend on the will of the grantee. Section 96. And a trust power does not cease to

be imperative where the grantee of the power has the right of selection among a class of objects. Section 97. And sections 100 and 101 make provision for the execution by a court of equity of trust powers where the trustee dies, or where the testator has created a valid power, but has omitted to designate a person to execute it. A trust power, to be valid, therefore, must designate some person or class of persons other than the grantee of the power as its objects, and it must be exercised for the sole benefit of such designated beneficiary, and its execution may be compelled in equity. A non-enforceable trust power is an impossibility under our law, unless, by the instrument creating it, it is expressly made to depend for its execution on the will of the grantee.

In every case where the trust is valid as a power, the lands to which the trust relates remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power. (1 Rev. St. 729, § 59.)

Before applying these rules to the case before us, our duty is to ascertain the testator's intention from an inspection of the will, and for this purpose we must read the whole instrument, including the provisions admitted to be void. Those provisions, though ineffectual to dispose of the property, cannot be obliterated when examining it for the purpose of ascertaining the testator's intention. (*Van Kleeck v. Dutch Church*, 20 Wend. 457; *Kiah v. Grenler*, 56 N.Y. 220.)

The prominent fact in the testator's will is that he intended to give his property to charity. He intended that none of his heirs or next of kin should take any of it except such as he gave to them through the several special trusts that he created for their benefit. He emphasized this purpose in the last article of his will, by providing that any of them who should institute or share in any proceeding to oppose the probate of the will, or to impeach, impair, or to set aside or invalidate any of its provisions, should be excluded from any participation in the estate, and the portion to which he or she might otherwise be entitled to under

its provisions should be devoted to such charitable purposes as his executors should designate. To the accomplishment of this purpose he intended to create a trust, and doubtless believed that he created a valid one. He created numerous trusts for the benefit of his relatives, and for the creation of other libraries and reading-rooms. These he denominated "special trusts." In the thirty-ninth article he devised and bequeathed to his executors, and "to their successors in the trust hereby created, and to the survivor and survivors of them," all the rest and residue of his property, "to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created * * * to possess, hold, and manage the same" during the lives of his niece Ruby S. Tilden and his grandniece Susie Whittlesey and "to apply the same, and proceeds thereof, to the objects and purposes mentioned in this my will." He gave to his executors the power to collect the income of the whole estate, that which was set apart in the special trust and that constituting the trust of the residuary estate. The trust of the residuary estate he denominated the "general trust," and in the twenty-sixth article he gives direction as to the disposition of the surplus income, "during the continuance of the trust of my general estate."

It is clear, therefore, that the testator intended to create a trust of his residuary estate, and in plain, unequivocal language he indicated his purpose to be that the trustees should be vested with the title to the property until they should divest themselves of it in carrying out the purposes mentioned in the will, and which are to be found in the thirty-fifth article. Turning to this article, the important feature is that the power there given to the trustees, and the only power that could absolutely effectuate the testator's intent to devote his property to charity, was an imperative one.

There is no discretion to be exercised upon the question whether the property shall go to charitable purposes. There is no act involving that disposition of the property, the

execution of which is made to depend on the will of the trustees.

Discretion there is as to the objects of the charity, but none as to the general disposition of the estate. If the Tilden Trust is incorporated in a form and manner satisfactory to the trustees, they are authorized to convey to that institution the whole residue or so much thereof as they shall deem expedient; and if, for any cause or reason, they deem it inexpedient to endow that institution with the whole or any part of the residue, then to apply the same, or such part as they do not apply to the use of the Tilden Trust, to such charitable purposes as they shall deem most widely beneficial to mankind.

The object and purpose in this scheme of the testator is, therefore, a devotion of his estate to charity.

But it is said that the Tilden Trust represents an intention different from and alternative to the gift to the charitable, educational, and scientific purposes mentioned in the last clause of the article. That the authority to endow it that is vested in the trustees is a primary power, and the power to devote the estate to the other undefined purposes is ulterior.

That while the latter is imperative in its character, the former is discretionary wholly, and depends for its execution upon the will of the trustees; and that each power stands alone, separate and distinct from the other, and the power to endow the Tilden Trust is likened to a power of appointment.

Powers of appointment are so common in testamentary dispositions of property that no citation of authority is necessary to show their validity.

Their execution may depend solely upon the will of the donee of the power, and they are recognized as valid by the ninety-sixth section of the statute already quoted. "I give to A. such portion of my residuary estate as B. shall, within the life-time of the survivor of C. and D., designate and appoint," which is the case suggested on the brief, is undoubtedly a good testamentary bequest, and is a good illus-

tration of a naked power of appointment, the execution of which depends on the will of B., and is not enforceable at the suit of A.

In such a case the title to the property descends to the heirs or next of kin, or passes under the will to the ulterior donee, subject to the execution of the power.

But there is no similarity between the suggested bequest and the will before us. Follow that bequest by a gift over to charitable uses, or let it stand alone in the will, and you have in one case alternative gifts, and in the other alternative purposes.

There is a preference expressed or implied by the testator as to the purpose to which his estate shall go, and the objects that shall be benefited.

In the one case, the choice lies between the individual legatee and the heirs, in the other, between the legatee and a disposition to charity.

But in the will before us there is no alternative purpose. There is a single scheme, a gift to charitable uses, and the suggestion of the Tilden Trust indicates no intent in the testator's mind contrary to the intention to devote the estate to charity, and in this respect the will before us is distinguished from the case suggested by the learned counsel for the appellants, of a power to convey the estate to a designated individual at a stated age, and in the event of the donee of the power deeming it inexpedient so to do, then a gift over to undefined, charitable uses.

There the primary purpose of the testator is a gift to the designated legatee, and not to charity; and the intent to give the estate to charitable uses is secondary, and limited upon the determination of the trustee not to make the primary gift. Such a will plainly indicates alternative purposes, and contains alternative powers. The two gifts are in no respect connected, and, if the gift over is void, the first may stand, and, if executed, represents the will of the testator.

But in the thirty-fifth article of the will under consideration there is no antithesis, so far as the purpose to which

the property is to be devoted is concerned. It expresses a single intent only, viz., to devote the estate to charitable uses, and while, of course, in such a scheme, the testator might prefer and designate one corporation over another as the object of his bounty, I shall attempt to show that in this case he has not done that, and has not conferred any preferential right to the estate, or any part of it, upon the Tilden Trust.

What is the Tilden Trust, and how does it stand in the testator's scheme?

It may fairly be assumed that the testator, having determined to devote his estate to charity, understood that his object could be accomplished only through the instrumentality of a corporate body.

He requested his trustees to cause the Tilden Trust to be incorporated. It was to have the power to establish and maintain a free-library and reading-room in the city of New York; and "to promote such scientific and educational objects" as the executors and trustees should designate. The latter power is precisely what the trustees are authorized to do by the so-called ulterior provisions, viz., to apply the estate to such "educational and scientific purposes" as they should judge would be most beneficial to mankind.

Here, therefore, we have an authority to the same thing in each provision of the will, and as the latter could only be worked out through the medium of a corporation, the so-called two powers are the same. So as to the free library and reading-room. That is plainly within the scientific and educational purposes of the second provision of the will and could be maintained only through a corporate body. The suggested capacities of the Tilden Trust are, therefore, precisely the same as the so-called ulterior purposes, and each are expressive of the testator's scheme, so far as he had formulated it in his own mind. The Tilden Trust, therefore, plainly does not represent any alternative or primary purpose in the disposition of the estate, but is simply the suggested instrument to execute the testator's scheme for the disposition of the property. Now, what did

the testator intend the trustees should consider when they came to the determination of the expediency or inexpediency of endowing that institution? The argument is that they could not consider the ulterior purposes at all until they had disposed of the question whether it was expedient to convey to the Tilden Trust all or a part of the residuary estate.

But that is saying that they should determine that question without reference to the substance of the gift, and the object and purposes which the testator had in view; for, as I have already shown, the capacities and powers of the Tilden Trust, in other words, its purposes and objects, or, rather, the purposes and objects which the testator intended to effectuate through its instrumentality, are precisely the same as the so-called ulterior purposes, and, as the latter must be carried out through the instrumentality of a corporation, the only distinction between the two is in the name of the corporation that is to administer the fund. The question of expediency, therefore, resolves itself into a question whether the trustees should select the Tilden Trust or some other corporation through which to carry out the purposes of the will. Now, how could the trustees, charged with the imperative duty of devoting the estate to charitable and educational purposes, consider the question whether they should endow the Tilden Trust without taking a complete view of the whole field of charity? They were bound to do so if they fairly attempted to carry out the testator's plan.

Take the question of the free library and reading-room. There is no duty or obligation imposed upon them in that respect. They are not bound to create or endow one. They are free to select any other educational object. So with locality. Can it be seriously claimed that there is any duty resting on them to establish a library in the city of New York? Is not the capital of the state or of the United States open to their choice of location, if they think a library located there would be more widely beneficial to mankind? Clearly, it appears to me that it was within the

scope of the discretion committed to the trustees to determine whether a free library or reading-room should be established at all, and whether that or any other charitable or educational institution that they might select should be located in the city of New York, and that their determination of such question would be among the causes or reasons which might lead them to decide that it was inexpedient to endow the Tilden Trust, and that the testator intended that when the trustees should consider the Tilden Trust they should consider their power with reference to the disposal of the estate, and the fact that if they did not endow that institution, they could still execute his wishes by applying it to such charitable, educational, and scientific purposes as they should select.

In other words, that if they did not give it to the institution that he suggested, and which would bear his name, they could give it to others, and still execute his will, and carry out his general purpose, for the disposal of his estate, and this power meant comparison of all charitable and educational objects, and selection from among them.

In substance, he said to his executors: I have determined to devote my estate to charitable, educational, and scientific purposes; I have formed no detailed plan how that purpose can be executed, but under the law of New York it must be done through and by means of a corporation. I request you to cause to be incorporated an institution to be called the Tilden Trust, with capacity to maintain a free library and reading-room in the city of New York, and such other educational and scientific objects as you shall designate, and, if you deem it expedient, that is, if you think it advisable, and the fit and proper thing to do,—convey to that institution all or such part of my residuary estate as you choose: and if you do not think that course advisable, then apply it to such charitable, educational, and scientific purposes as, in your judgment will most substantially benefit mankind. Thus was left to the trustees the power to dispose of the estate within the limits defined, and to select the objects that should be benefited, and it is impossible to

read the thirty-fifth article, and find therein any preference in the way of a separate gift or power to the Tilden Trust, or to separate that institution from the testator's plan to devote his estate to charity. The trustees are free to select the Tilden Trust, and cause it to be incorporated, or to choose any existing corporation as the instrument to carry out the testator's scheme. Again, no event is named upon the happening of which any estate is limited to the Tilden Trust. The only condition suggested is the determination by the trustees of the question whether they deem it expedient to endow that institution. But if the views already expressed are correct, if the Tilden Trust is but one of many instruments through which the testator's charitable purposes may be executed, or is but a suggested beneficiary under the power, then the determination of the question of expediency involves the doing of the very thing which the law condemns, viz.: a selection from an undefined and unlimited class of objects, and the power would be void.

It thus becomes apparent how important is the so-called ulterior provision in the plan which the testator had for the disposal of his estate, and effect cannot be given to that plan if that provision is stricken from the will, as it expressly defines the scope of the discretion committed to the trustees.

Strike out that provision, and, instead of a discretion in the trustees limited to the selection of the objects that should be benefited by the will, their power would be confined to the endowment of the Tilden Trust; and if they choose not to act, or failed to act, the estate would go to the heirs-at-law. Indeed, the legal effect of the will would be in that case to vest the title of the estate in the heirs, subject to the execution of the power to endow the Tilden Trust.

But if the provision of the will makes one thing particularly clear, it is that the testator intended his estate to be devoted to charitable purposes, and should in no event go to his heir, and he did not intend that his trustees should

have the power to choose between his heirs and the Tilden Trust.

We cannot, therefore, obliterate the so-called ulterior provision, and give effect to the scheme of the will.

The discretion plainly conferred on the trustees in the delegation of the power to determine the expediency or in-expediency of endowing the Tilden Trust would be thereby destroyed, and the trustees would be compelled to convey the estate to that institution, or, by permitting the heirs to retain it, thwart the expressed wish of the testator.

Again, the appellants argue that the power to endow the Tilden Trust is one depending for its execution on the will of the trustees, and is not imperative, and hence not subject to the test whether it can be enforced in a Court of Equity. This argument is perhaps fairly answered when the conclusion is reached that the ulterior purpose cannot be stricken from the will, and that the thirty-fifth article represents but one scheme and one purpose for the disposal of the estate.

But it will be apparent, in the view here taken that the testator did not intend that any power conferred upon his trustees should depend for its execution upon their will. Of course, in every power where the trustees have the right to select any and exclude others, there is necessarily involved discretion, and the final choice does in one sense, rest upon the will of the trustee but not as that term is used in the statute. The power conferred is the authority to convey the estate. That is imperative. The discretion committed to the trustees was to select the particular object. The choice depends on the trustees' will, but the act of choosing is imperative, else the power could not be executed. It is the result alone, therefore, that depends on the will of the trustees, and not the performance of the act of selection. A power is defined to be "an authority to do some act * * * which the one granting or reserving such power might himself lawfully perform." (1 Rev. St. 732, § 74.) Section 58 provides that if the unauthorized trust there mentioned directs the "performance of any act" which may be law-

fully performed under a power, it shall be valid as a power in trust.

Now, the acts authorized by the testator were those of selection and conveyance. The result of selection depended on the will of the trustees,—whether they should choose one corporation or another,—but the performance of the act of selection was just as obligatory as the duty to convey. The testator intended both should be performed, and the trustees could no more refuse or neglect one than the other. It follows from the views here expressed that the authority to endow the Tilden Trust, if that should be deemed expedient by the trustees, was not a separate power, distinct from the purpose to devote the estate to charitable uses, but was incidental to the testator's scheme, and involved therein.

While we may admit that the testator expressed a preference for a corporation that should bear his name, he conferred no right upon that institution. The purpose to which the estate should be applied he determined and designated, but the persons who should be benefited by the will and the particular institution that should administer the fund was left to the selection of the trustees. The expression of a preference conferred no right, so long as the final choice was left to the trustees.

It was simply a suggestion which they might or might not adopt, and imposed no duty upon them, and in no way limited or fettered their action. (*Lawrence v. Cooke*, 104 N. Y. 633; 11 N. E. Rep. 144; 2 Pom. Eq. Jur. 1016, note.)

We are of the opinion, therefore, that the thirty-fifth article of the will does not confer separate powers upon the trustees, and that the so-called ulterior provision cannot be eliminated from the will without destroying the scheme that the testator designated for the disposal of his estate. That the whole article represents one entire and inseparable charitable scheme, and cannot be subdivided, and the power conferred on the trustees is one of selection.

This power was, under the statute, special and in trust. Under the section heretofore quoted, such a power is im-

perative, and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of the parties interested, unless, its execution or non-execution is made expressly to depend on the will of the grantee; and it does not cease to be imperative where the grantee has the right to select any and exclude others of the persons designated as the objects of the power.

The power conferred by the will, not being made to depend for its execution on the will of the trustees, was therefore imperative, but it is not valid unless it can be enforced by the courts at the suit of some beneficiary.

As the selection of the objects of the trust was delegated absolutely to the trustees, there is no person or corporation who could demand any part of the estate, or maintain an action to compel the trustees to execute the power in their favor. This is the fatal defect in the will. The will of the trustees is made controlling, and not the will of the testator.

Such an authority is in contravention of the statute of wills. That statute authorizes a person to "devise" his real estate, and "to give and bequeath" his personal property, but it does not permit him to delegate to another the power to make such disposition for him. As was said by the learned presiding justice of the general term, "the radical vice of the entire provision seems to have arisen from the testator's unwillingness to confer any enforceable rights upon any qualified person or body." (7 N. Y. Supp. 393.)

Under the statute of powers there may be a power of selection and exclusion with regard to designated objects, and the duty there imposed is made imperative and enforceable by the court.

But the statute presupposes that a power of selection must be so defined in respect to the objects that there are persons who can come into court, and say that they are embraced within the class, and demand the enforcement of the power. (*Read v Williams, supra*, page 569, 125 N. Y., and page 731, 26 N. E. Rep.) The views which Judge VAN BRUNT expressed in that case on that point at general term

received direct approval in this court. He said: "It is conceded that the power contained in the clause in question comes under the head of a special power in trust, as defined in the Revised Statutes, but it is said such a power is to be distinguished from a trust; that the words 'in trust' are used for purposes of classification only. We think, however, that, * * * to render a power in trust valid, the same certainty as to beneficiary must exist as in the case of a trust." (27 N. Y. State Rep. 507; 8 N. Y. Supp. 24.)

These views find full confirmation in the provisions of the statute to the effect that, if the trustee dies, leaving the power unexecuted, a court of equity will decree its execution for the benefit equally of all persons designated; and, if the testator fails to designate the person by whom the power is to be executed, its execution devolves upon the court (§§ 100, 101), thus providing a scheme which prevents the failure of a testator's purpose, when its subject is certain and its objects designated.

But in this case execution of the power could not be decreed by the court in either of the cases specified in the statute.

By an enforceable trust is meant one in which some person or class of persons have a right to all or a part of a designated fund, and can demand its conveyance to them, and, in case such demand is refused, may sue the trustee in a court of equity, and compel compliance with the demand.

In this case the testator devolved upon his executors the duty of selecting the beneficiary, and there is no person who has the right to enforce that duty, or demand any part of the estate in case the executors refuse or neglect to act.

The power attempted to be vested in the trustees cannot be controlled or enforced, and, whether the provisions of the will relating to the residuary estate be regarded as creating a trust or power in trust, they are, in either case, void. The judgment should be affirmed.

BRADLEY, J. (dissenting.)—This action for the construction of the will of Samuel J. Tilden, deceased, was founded on the charge that it was ineffectual to dispose of the residuary estate or to provide for any lawful disposition of it, because the provisions of the thirty-fifth article, by which that was sought to be accomplished, were invalid in that they were, as to both the object and subject of the trust he had in view, indefinite and uncertain. If this proposition is supported, the conclusion that such was the effect necessarily follows.

It is evident that the testator, when he made his will, intended not to die intestate as to any of his property. And that his purpose to make testamentary disposition of all of it not only appears by the dispositional provisions of his will, but also by those of the forty-third article, by which he declared: "Since I have made a disposition of my property according to my best judgment; and since, as most of the devisees under it are females, it is impossible to foresee under what influences some one or more of them might possibly come, and since it is desirable to avert unseemly or speculative litigation,—I hereby declare it to be my will that in case any person who, if I had died intestate, would be entitled to any share of my property or estate, shall, under any pretense whatever, institute, take, or share in any proceeding to oppose the probate of this, my last will and testament, or to impeach or impair, or to set aside or invalidate, any of its provisions, any devise or legacy to or for the benefit of such person or persons under this will is hereby revoked, and such person shall be excluded from any participation in, and shall not have any share or portion of, my property or estate, real or personal; and the portion to which such person might be entitled under the provisions of this instrument, shall be devoted to such charitable purposes as my said executors and trustees shall designate."

In proceeding to the consideration of the questions presented, it may be observed, as a cardinal rule of construction, that the intent of a testator should be sought for in

the provisions of his will, and, when so ascertained, effectuated, if the language used permits, although the transposition, rejection, or supply of words may be required to clearly express such intention; and, when susceptible of it, the construction will be given which renders it operative rather than invalid. (*Hoppock v. Tucker*, 50 N.Y. 203; *Phillips v. Davies*, 92 N.Y. 199; *Du Bois v. Ray*, 35 N.Y. 162.)

He had in view the creation and endowment of a Tilden Trust, with the capacity mentioned. He, therefore, requested the executors and trustees to obtain, as speedily as possible, from the legislature, an act of incorporation of an institution to be known as the Tilden Trust; and in case that should be accomplished within the time limited by the two lives mentioned, he authorized them to organize the institution, and convey to or supply to its use the rest, residue and remainder of his estate, or so much of it as they should deem expedient. Thus far he has, in practical effect, directed the application to be made for legislative action, and has made no provision for the disposition of the fund, other than to the use of the corporation in the event of its creation; and because that was a contingency not within the control of the executors and trustees, and for other reasons which might exist at the time of his death to render the endowment of the Tilden Trust, if created, inexpedient, the testator, with a view to entire testacy, added: "But in case such institution shall not be so incorporated, * * * or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey said rest, residue and remainder, or any part thereof, or to apply the same, or any part thereof, to the said institution, I authorize" them to apply it, "or such portion thereof as they may not deem it expedient to apply to its use, to such charitable, educational and scientific purposes as in the judgment of my said executors and trustees will render the said rest, residue and remainder of my property most widely and substantially beneficial to the interests of mankind." This provision, treated independently of any other, requires no consideration. The *cy*

pres doctrine, available to give effect to trusts for charitable uses without any defined beneficiary in England, has no place in the law of this state. The attempt thus made by the testator to provide, in the event mentioned, for a trust dependent upon the selection by the executors and trustees of the charitable, educational and scientific purposes to which the fund should be applied, was ineffectual, and void for indefiniteness and uncertainty. *Prichard v. Thompson*, 95 N. Y. 76; *Holland v. Alcock*, 108 N. Y. 312; 16 N. E. Rep. 305; *Read v. Williams*, 125 N. Y. 560; 26 N. E. Rep. 730.

The proposition on the part of the appellants is that by the thirty-fifth article the testator made two distinct alternative provisions for the disposition of the residue of his estate; that the one relating to the incorporation and endowment of the Tilden Trust was primary, and the other, following it, was ulterior, and intended (if that institution was incorporated) to be made effectual in the event only that the executors and trustees deemed it inexpedient to apply such residue, or only a portion of it, to the Tilden Trust. On the contrary, the counsel for the respondent contend that there are no such separate alternative provisions in the article, but that the testator there provided for the disposition by the trustees of his residuary estate to charities, etc., of which the Tilden Trust was one of the objects, and that the power given to the executors and trustees was that of selection merely. In some cases it has seemingly been held that when words of a will expressing a class of beneficiaries or objects of a trust may be taken distributively, and some of them are lawful objects of the trust and others not, it may be effectual as to the former; but the weight of authority is otherwise, and in such case the power of mere selection in execution of the trust, attempted to be so given, is wholly void. (*Williams v. Kershaw*, 5 Clark & F. 111; *Vezey v. Jamson*, 1 Sim. & S. 69; *Ellis v. Selby*, 1 Mylne & C. 286; *Mitford v. Reynolds*, 1 Phil. Ch. 190; *In re Jarman's Estate*, L. R. 8 Ch. Div. 584; 25 Moak Eng. R. 496.)

If that view, as applied to the present case, is supported, the conclusion must follow that the testator failed by his will to make any valid provision for the disposition of his residuary estate. Then the trusts, and the power which the testator attempted to create and vest in his executors and trustees, would constitute a single scheme for the appropriation of the fund by them to such charitable, educational and scientific purposes as they should choose to select. But a different question is presented if the provision relating to the creation and endowment of the Tilden Trust may be legitimately treated independently of that following it, by which he sought to make provision for such general undefined purposes. Then the effect of the former would not necessarily be embarrassed by any relation to the latter. (*Savage v. Burnham*, 17 N. Y. 561; *Schettler v. Smith*, 41 N. Y. 328; *Manice v. Manice*, 43 N. Y. 303; *Kennedy v. Hoy*, 105 N. Y. 134; 11 N. E. Rep. 390.

The disposition of this question depends upon the construction to which that article of the will may be entitled, having in view the principles applicable to the interpretation of such instruments.

As has already been seen, the first duty imposed upon the executors was to seek, by legislative act, the incorporation of the Tilden Trust; and it may be assumed that this was not required or designed as a useless ceremony. When that should be effected, they were authorized to organize the corporation, designate its first trustees, and convey to it, or apply to its use, the residue of his estate, or so much of it as they should deem expedient. We need go no further to see the purpose for which the Tilden Trust was intended in its relation to the fund. How is the purpose so represented necessarily qualified by any of the provisions following it? There were certain contingencies in view which would have the effect to defeat the execution of the power to endow such an institution, and upon which the limitation of the fund, or some portion of it, to the general charitable, educational and scientific purposes was provided for. The first was the failure to obtain the incorporation

of the Tilden Trust. In that event, the testamentary disposition of the residue of the estate was dependent upon such provision for application to charitable, etc., purposes. But, if it should be incorporated, the contingency dependent upon the determination of the executors and trustees, to the effect that it was expedient to apply a portion only, or inexpedient to apply any part, of the fund to that institution. It quite plainly appears that the testator intended that, if legislative action could be effectually had for that purpose, the Tilden Trust should be incorporated, and, that being accomplished, its endowment should first be considered and determined; and that in the event only that it should by the trustees be deemed inexpedient to apply to it any of the residue of his estate, or expedient to apply to it less than the whole of such estate, would there be any occasion to seek other charitable, educational or scientific purposes to which to appropriate the fund or any portion of it.

It is urged that, because the gift of the testator is, by the terms of the will, made to the executors and trustees, their power is that of selection, and consequently there is no limitation created by the testator, and can be no primary or ulterior gift, within the import of the language employed. But gifts may be made by a testator by means of powers vested in trustees to whom the estate is devised and bequeathed, and limitations contingent in character may be dependent upon the execution or non-execution by the trustees of powers conferred upon them. The question whether the provisions for the disposition of the residuary estate are or are not alternative, primary and ulterior is one of construction. The fair interpretation of the language of the thirty-fifth article permits, and the evident intent of the testator as there manifested, requires the conclusion that the two are alternative provisions, and that they are primary and ulterior. The former is definite in its object; the latter is otherwise.

It is true that by the terms of the thirty-ninth article the testator devised and bequeathed all of his residuary estate

to the executors and trustees for the purposes mentioned in the will. This is designated at other places in his will as "general trust," to distinguish the residuary fund from the various special trusts created by the will. But this does not qualify or modify the construction to which the provisions of the thirty-fifth article would otherwise be entitled in the respect we are now considering them. The manner in which the fund should be applied was dependent upon contingencies, some of which were within the powers vested in the executors and trustees; yet the purpose of the devise and bequest must be considered in reference to the power conferred upon them by the provisions of that article, and in view of the manner in which it might by virtue of those provisions be properly executed. The arbitrary exercise of power may characterize the effect which may be given to it, rather than its purpose. So, in the present case, the executors and trustees could have unfaithfully exercised their discretion upon the question of expediency. But, while the test of expediency or in expediency was left to their discretion, they could not, consistently with the intent of the testator, as plainly manifested by his will, have applied any part of the fund to the purposes of the general charity mentioned in such ulterior provision, until they had in good faith determined, for some "cause or reason," that it was inexpedient to apply it, or some and what portion of it, to the Tilden Trust.

And, although the exercise of discretion may not be subject to judicial control or review, it may be said that, for the purpose of interpretation, it is the intent of the donor so made to appear that properly measures the discretionary power of those who are to execute it, and not the opportunity for its unfaithful execution found in its discretionary character. The power vested in the executors and trustees was not that of mere selection of a beneficiary or beneficiaries among all the objects which were embraced within the scope and meaning of the thirty-fifth article; they were not authorized to reach the consideration of the undefined objects of charity, etc., there referred to, for the purpose

of selection from them, until they had disposed of the question whether the specific beneficiary, the Tilden Trust, should or not be endowed. That was the definite object to which their attention was first to be directed, and the question of the application to it of the fund to be determined. This the trustees were to do before any matter of selection from among indefinite charities was reached. The scope of the inquiry for that purpose was to be extended to other objects, "if for any cause or reason" they should deem it inexpedient to apply any part of the residuary fund, or expedient to apply less than the whole of it, to the Tilden Trust, and not otherwise. This seems to have been the purpose the testator had in view, as appears by the provisions of that article. This is not repugnant to any other provision of the will. And his intent, as manifested by the language used, must be effectuated if it can be consistently with the rules of law. (*Smith v. Bell*, 6 Pet. 68; *Wager v. Wager*, 96 N. Y. 164; *Roe v. Vingut*, 117 N. Y. 204; 22 N. E. Rep. 933.)

The provision for the Tilden Trust must therefore be treated as primary, and distinct from that for general charities, etc.; and the question whether or not the former provision was effectually made remains to be considered. It is requisite to the validity of any provision of a will that it is or may become capable of lawful execution, and that test is applicable as of the time of the death of testator. There may be future contingencies provided for upon which gifts are made to depend, and beneficiaries may not be definitely known or ascertained at the time of the testator's death. It is sufficient that they are so described as to be ascertained in the future, when the right accrues to receive the gift. (*Holmes v. Mead*, 52 N. Y. 332; *Shipman v. Rollins*, 98 N. Y. 11.) And a devise or bequest may be limited to a corporation not in existence at the time of the death of the testator, provided it is created within the time allowed for vesting of future estates. This question was considered in *Inglis v. Sailor's Snug Harbor* (3 Pet. 99); *Ould v. Hospital* (95 U. S. 303); and in this state it was so determined in

Burrill v. Boardman (43 N. Y. 254), and reaffirmed in *Shipman v. Rollins* (98 N. Y. 328). In the *Burrill* Case it was treated as in the nature of an executory devise, dependent upon incorporation of the institution there contemplated, and it was held that the estate vested on the occurrence of that event. In that respect that case is distinguishable from the present one, as in the latter it was contemplated that the vesting should depend upon the conveyance to the Tilden Trust, or application to its use, by the executors and trustees to whom, by the terms of the will, the residuary estate was devised and bequeathed. This distinction arises out of the fact that, upon the contingency which enabled the institution in the *Burrill* Case to take the fund, the trust upon which the trustees held it terminated, and there was no opportunity remaining for any limitation over, while it was otherwise in the case at bar. But, treating the provisions of the thirty-fifth and thirty-ninth articles of the will as creating a trust power, it is not seen that the fact that the estate did not vest in the corporation on its creation necessarily has, of itself, any essential importance for the purpose of the question now under consideration, provided the power was adequately given to convey or apply it to the use of the institution. While it could not in that case be deemed what was formerly known as an executory devise, it might, in behalf of the Tilden Trust, be treated as a conditional limitation of the estate, or a power dependent for its execution upon a condition. The testator evidently intended to vest in the executors and trustees all the control he could of the title to his residuary estate. But it cannot, for the purposes of the question here, be assumed that he intended their relation to it should be other than the legal effect of that which they took by the will. As to the realty, no title passed to the trustees, and no trust, within the statute, was created. When by the statute express trusts were reduced to those for the execution of which taking of the title was deemed essential (1 Rev. St. p. 728, § 55), it took from others none of the elements of trusts other than such as were dependent upon

the title as formerly taken by the trustees, and none of the powers of execution not so dependent; and it was provided that, when an express trust should thereafter be created for purposes other than those enumerated in section 55, no title should vest in the trustees, but, if the trust directed or authorized the performance of any act which might lawfully be performed under a power, it should be valid as a power in trust. (Id. p. 729, § 58.) If, therefore, the provisions of the thirty-fifth article of the will would, but for the statute, have constituted a trust, and authorized the performance of any act which might lawfully be performed as such, they, so far as they relate to real property in the residuary estate of the testator created a power in trust; and although the larger part of such estate was personalty, and the trust as to that is not subject to the statute, the distinction in that respect, for the purposes of the questions requiring consideration, need not be observed, as the subject of powers is substantially applicable alike to both. (*Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Bankard*, 92 N. Y. 295.)

It is urged that by the provisions in question the testator neither directed nor authorized the performance of any act of disposition of the residuary estate which could lawfully be performed, within the meaning of the statute defining a power in trust; and that there was not only no party to effectually demand their execution, but they had no enforceable character. It is true the creation of a trust depends upon the nature of the provisions by which its creation is sought. It is also the rule that a trust is imperative; and at common law the same rule is applicable to a power coupled with a trust, although otherwise as to a naked power. (2 Story, Eq. Jur. § 1061). The primary one of those provisions certainly was not enforceable at the time of the death of the testator. There was then no Tilden Trust, and its then future existence was contingent. When it was created its ability to take depended upon its incorporation being in form and manner satisfactory to the executors and trustees, and, that being so, it was made

discretionary with them whether the institution should have the whole or any, and what portion, of the residuary fund. It would therefore seem to follow that, upon the incorporation of the Tilden Trust, it could not, without action of the trustees, have enforced conveyance or application to it of the fund or any portion of it. In that view, and upon the construction given to the thirty-fifth article, the question is whether the trustees were enabled to vest the fund in the Tilden Trust, or, by the exercise of discretionary power given to them, could have afforded to that institution the right to demand and enforce in that respect the execution of the provisions of the will in its behalf. As already seen, the testator did not intend to die intestate as to any portion of his property; and that he did intend to impose upon his executors and trustees the imperative trust power for the disposition of his residuary estate appears by the provisions of the thirty-ninth article, by which he directed them "to apply the same, and the proceeds thereof, to the objects and purposes mentioned" in the will. This is borne out by the terms of the thirty-fifth article by imputing to him the understanding that the secondary provision of that article was valid, as upon the contingency there mentioned he provided for the disposition of it. And the latter provision cannot be overlooked, but must be consulted to ascertain his intent, with a view to the aid, so far as it may furnish it, to the interpretation of the other provision in question. (*Van Kleeck v. Dutch Church*, 20 Wend. 458, 481; *Kiah v. Grenier*, 56 N. Y. 220). But if the primary provision was of itself valid in its object, purpose and effect, it was not invalidated by the fact that the trustees were in terms in the events stated in the article empowered to apply the fund to the indefinite purposes mentioned in the ulterior provision for which testamentary disposition of property could not lawfully be made. (*Attorney General v. Lonsdale*, 1 Sim. 105; *Salisbury v. Denton*, 3 Kay & J. 529; *Carter v. Green*, id. 591). In other words, the limitation to the indefinite objects did not deny to the former the provision for the Tilden

Trust the effect to which it otherwise may have been entitled. (*Savage v. Burnham*, 17 N. Y. 561; *Kennedy v. Hoy*, 105 N. Y. 134, 11 N. E. Rep. 390).

In such case, the subject would be within the control of the court, and, on proper application, it would restrain the power for such unlawful purpose. The contention of the respondent's counsel is that it was essential to the validity of the provision in behalf of the Tilden Trust that the residuary estate should have vested in it at the time it came into corporate existence, or that the institution should then have been entitled to demand and enforce, by decree of the court, the conveyance to it, or the application to its use, of the fund by the trustees. This proposition, (upon the construction here given to the provisions in question), in effect, seems to be that a trust or trust power could not exist with or survive the intervention of the discretionary power which the testator intended to give the trustees. But it may be observed, that while a valid trust is imperative, attending it may be powers upon which limitations and executory bequests may be contingent, and the exercise of those powers may be discretionary. (*Hawley v. James*, 5 Paige, 318, 478; 16 Wend. 61, 176; *Mason v. Jones*, 4 Sandf. Ch. 623; 13 Barb. 461; *Costabadie v. Costabadie*, 6 Hare, 410; *French v. Davidson*, 3 Madd. 396; *Walker v. Walker*, 5 Madd. 424; *Cole v. Wade*, 16 Ves. 27).

It is very likely that, if the testator had apprehended the invalidity of the ulterior provision of the thirty-fifth article, he would have provided a different limitation in the event there mentioned. But it cannot be assumed that the primary provision for the appointment and disposition of the residuary estate to the Tilden Trust would have been other than that which he made. The efficiency of the power given by this provision is not dependent upon the character of the ultimate limitation, nor is it less effectual than it would have been if that had been to a lawful object of testamentary gift. The difference is that in the one case it was within the power of the trustees to defeat the disposition by the will of the residuary estate, and in the other

they could not. But in the latter case they, by the execution of the discretionary power, could have rendered the ultimate provision ineffectual, and for the purposes of the disposition of the fund inoperative; and therefore, unless the contingency arose upon which the ultimate limitation of it was dependent, it would not be important, for any practical purpose, whether it was valid or not, and in that event only would an enforceable character of the trust or trust power be essential to effectuate the intent of the testator. His purpose, it must be assumed in view of the power given, would be accomplished by the disposition to the incorporated institution designated by him. The creation of this power, in nature and purpose, was lawful, and through its execution the gift to the Tilden Trust could legitimately be effected, although in respect to the appointment to that institution it was made dependent upon the will of the executors and trustees. While it is essential to a trust, as such, that it be imperative, and therefore enforceable by decree in equity when the time arrives for its execution, it is not so of a mere power, or necessarily so of a trust power, although the latter is imperative, unless its execution or non-execution is made expressly to depend upon the will of the grantee. The testator intended to make the execution of the power of appointment to the Tilden Trust dependent upon the will of the trustees, as expressly appears by the provision creating it. The contention, therefore, that this power of the primary provision was invalid because its execution was not judicially enforceable in equity on behalf of that institution, does not, in the view taken, seem to be maintained. The imperative character intended by the testator to be made applicable, and in a certain event to be applied, to the disposition of the residuary estate, had relation to the ultimate limitation which was dependent upon the contingency that the trustees, in their discretion, concluded not to appoint to the Tilden Trust any or only a portion of such fund. And, as such limitation was invalid for indefiniteness and uncertainty in its object, the testator failed by it to effectually

make any imperative provision for the disposition of the residuary estate by means of a trust, power in trust, or trust power enforceable as such, except so far as should be necessary to make and keep good the special trusts as directed.

And as the will furnished no support for an ultimate limitation of the fund in the event the trustee should have deemed the execution of the power of appointment to the Tilden Trust inexpedient, the real property within the residuary estate descended to the heirs of the testator, subject to the execution of the power of appointment and disposition to that institution, and the right of his next of kin to the administration in their behalf of the personalty of such estate was subject to the execution of the same power.

Now, by reference again to the provisions of the thirty-fifth article, it may be seen, as plainly appears by their terms, that the testator intended that the trustees should exercise the power conferred upon them to consummate the disposition of the residuary estate for the declared purposes of the trust. If they were successful in their effort to obtain the corporate charter, it was their duty to determine whether it was satisfactory, and, in the event it was so, then, unless they deemed it inexpedient to apply any part of the fund to the Tilden Trust, the further duty was imposed upon them to determine whether it should take all of it, and, if not all, to appoint the amount of it so to be appropriated. It is apparent that the testator intended to make the exercise of such power a duty, and essentially so to carry out his declared purpose. The discretion which he evidently intended to give the trustees related, not to the execution of the power, but only to the manner of its execution. In that view, (which seems well supported), may not the limitation to the Tilden Trust have been lawfully conditional, not only on its incorporation, but as well upon the manner such preliminary power, discretionary only in that respect, should be executed?

In *Ould v. Hospital*, 95 U. S. 303, the estate, for the

purposes of the trust, was devised to trustees, with a view to the incorporation, after the death of the testator, of an institution to which they, in that event, were to convey the estate, provided the corporation was approved by them; otherwise not. The hospital was incorporated, and conveyance made to it by the trustees. The validity of the trust was contested, and the court held that the provision relating to a conveyance upon the creation of a corporation approved by the trustees was a conditional limitation of the estate vested in them. In that was involved the discretionary power of the trustees relating to the approval of the corporation. It is essential that the object and subject of a testamentary dispositional provision be definite, and when so designated that they are or may become such, and properly be ascertained, a limitation may by the testator be made to depend upon a future condition, having regard to the statute of perpetuities, and such condition may consist of a power resting in the discretion of a trustee provided for and defined by the will; and, when the condition is fulfilled, the limitation may be enforced.

The doctrine of the common law on the subject of powers of appointment and selection, except so far as it permitted the treatment of them as illusory, is consistent with the statute relating to powers, which provides that "a power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform." (1 Rev. St. 732, § 74). The powers now under consideration are a special power and a special power in trust, which, as defined by the statute, are those where the persons or class of persons to whom the disposition of lands is to be made under the power are designated (Id. § 78); and "(1) when the disposition which it authorizes is limited to be made to any person or class of persons other than the grantee of such power, entitled to the proceeds, or any portion of the proceeds, or other benefit to result from the execution of the power; (2) when any person or class of persons other than the grantee is designated as entitled to

any benefit from the disposition or charge authorized by the power." (Id. p. 734, § 95.)

The provisions of the thirty-fifth article of the will in terms, in view of those of the thirty-ninth article, created a special power in trust; and because the testator intended that his residuary estate should be disposed of, as directed by his will, for the purposes of the trusts there mentioned, the provisions were apparently imperative; such, at all events, would have been their effect if the ulterior disposition to which the estate was conditionally limited had been valid. And the statute provides that "every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested." (Id. p. 734, § 96.) The ultimate limitation was, by the terms of the will, imperative, in the event that the trustees failed for any cause to dispose of the fund under the primary one, which alone was made dependent upon their discretionary power. The Tilden Trust could take only through the power in the nature of that of appointment vested in the trustees; and the fact that the exercise of that power was discretionary, and could not be enforced, produced no legal infirmity in the provision relating to that institution, its ability to take, and to the limitation to it dependent upon such appointment. (*Chatteris v. Young*, 6 Madd. 60; *Lancashire v. Lancashire*, 1 De Gex. & S. 288; 2 Phil. Ch. 657; *Cole v. Wade* 16 Ves. 27; *Perry, Trusts*, § 503; *Hill, Trustees*, 490-492.)

So far as the statute relates to the subject of the power of appointment, it provides that where, under a power, a disposition is directed to be made among several designated persons, without specification of the share to be allotted to each, all of them shall be entitled in equal proportion. (1 Rev. St. p. 734, § 98.) But, when the terms of the power import that the fund is to be distributed between them in such manner or proportions as the trustee may think proper he may allot the whole to any one or more of such persons,

in exclusion of the other. (Id. § 99.) The trust power in such case does not cease to be imperative. (Id. § 97.) And if the trustee having such power shall die leaving it unexecuted, its execution shall be decreed in equity, for the benefit equally of all the persons so designated. (Id. § 100.) These provisions of the statute are in that respect substantially declaratory of the common law. (*Swift v. Gregson*, 1 Term. R. 432.) It was there, as it is by our statute, a trust power; and it is not important, for the purposes of the question, whether the designated persons are vested with the fund subject to the execution of the power, or take by reason of the power given. In the one case there is a gift expressed, and in the other implied, which will be executed by decree of the court, in default of execution of the power by the donee of it. (1 Perry, Trusts, § 250; *Walsh v. Wallinger*, 2 Russ. & M. 78; *Lees v. Whiteley*, L. R. 2 Eq. 143.)

No such implication arises where there is a limitation over of the estate or fund to other objects in default of the execution of the power by the donee; and in that case the objects of the power take nothing, as their beneficial interest or the limitation to them is wholly dependent upon the execution of the power by him. (*Davidson v. Proctor*, 19 Law J. Ch. 395; 14 Jur. 31; *Pearce v. Vincent*, 2 Mylne & K. 800; 2 Bing. N. C. 328; 2 Keen, 230; *Goldring v. Inwood*, 3 Giff. 139.) And, although the power of appointment and selection rests in the discretion of the trustee, it is valid, and may be effectually executed by him. (2 Perry, Trusts, § 508; *Brown v. Higgs*, 8 Ver. 561.)

In the present case the provision relating to the Tilden Trust conferred upon the trustees a power of appointment and disposition to a definite object, with a limitation over on default of such appointment; and, so far as by the terms of such provision the execution of the power was left to the judgment or discretion of the trustees, it was expressly made to depend on their will, within the meaning of the statute. And, as before remarked, the apparent purpose and effect of this provision was not qualified or defeated by

the fact that the ultimate limitation was to objects so indefinite as to render it ineffectual. In practical effect, it was the same as if the fund had been limited over to the heirs and next of kin of the testator, as they necessarily would take in default of the execution of the power.

In *Power v. Cassidy* (79 N. Y. 602), the fund was bequeathed to the executors, with power of appointment and selection among a designated class of beneficiaries. While the manner of executing it was discretionary, the trust or trust power was imperative, and, on default of the executors to execute it, the power would survive them, and the designated objects would then ultimately be entitled to share equally in the fund, and it would be enforced accordingly. But as to those beneficiaries it would not, in that sense and for that purpose have been imperative, if there had been a limitation over to other objects on such default, although as to the latter it would have retained its imperative character; yet the power thus given of appointment would have been valid, and may have been effectually executed.

It is essential to the constitution of a valid trust, or special power in trust, by a testator, that the objects be so designated or described that they may be definitely known or ascertained from the provisions of his will. And it was the failure of the testators to so designate or define the objects of the attempted trusts which came to the attention of the court, and were for that reason held invalid, in *Pritchard v. Thompson*, (95 N. Y. 76); *Holland v. Alcock*, (108 N. Y. 312; 16 N. E. Rep. 305); *Read v. Williams*, (125 N. Y. 560; 26 N. E. Rep. 730.) In those cases the trust power sought to be given was that of appointment and selection, without limitation over. The infirmity which rendered invalid the provisions of the wills in question in those cases was that no beneficiary was designated or pointed out by, or ascertainable from, the will, having any interest in the execution of the power, or who could assert in court any claim founded upon the trust. Those provisions of the wills were therefore held invalid for indefinite-

ness of the classes of objects of the trusts sought to be created; and in this respect they were distinguished from *Power v. Cassidy*. The present case is distinguishable from them in like manner; and further, that the power by the primary provision in question was not that of appointment and selection among members of a class, but was of appointment and disposition to a definitely designated beneficiary. It is also essential that the subject of the power be designated and certain, or that the means be provided by the will to render it properly ascertainable or certain. The provision of the power in that respect is for the application to the Tilden Trust of the residue of the estate, or so much of it as the trustees should deem expedient. The cases before cited, recognizing as effectual discretionary power given to trustees to regulate, control, or determine the amount which certain beneficiaries should receive of specific funds, to be exercised in reference to circumstances which the donors of the power had in view, have some bearing upon this question. Those are the *Hawley, Mason, Costabadie, French, Walker*, and *Cole Cases*, *supra*. The residuary estate was a definite fund, and unless the trustees determined that it was inexpedient to endow the Tilden Trust, they were at liberty to apply to it the entire fund; but whether expedient to so apply all or less than the whole of it was a matter of judgment of the trustees, to be founded upon the amount of the residue in reference to the sum suitably available for the purpose of the institution, and that was the amount the testator authorized the trustees to appoint to the institution. This was the means provided by the will to make certain that which, until such action by the trustees, was uncertain.

In *Peck v. Halsey*, (2 P. Wms. 387), it was held that a bequest by the testatrix of some of her best linen to A. was void for uncertainty, but that a bequest of such of her best linen as the executor should think fit, or as the legatee should choose, would have been good.

In *Kennedy v. Kennedy* (10 Hare, 438), the testator gave all his household furniture, etc., to trustees, and directed

that all his household property be sold by them, except such articles as his wife should desire to retain, and he authorized her to appropriate to her own use. Held, that the power of selection was effectually given to the wife. And *Arthur v. Mackinnon* (11 Ch. Div. 385), is to the same effect. It has been seen, by reference to the statute, that the power of appropriation of a fund among the members of a class may be created, and the donee of the power be authorized in his discretion to appropriate it in such proportions as he may please. This was so at common law. When the fund is definitely designated, it would seem that power may be conferred upon the donee of the power to determine what portion of it may be appointed to a definite beneficiary designated by the donor.

Our attention has been called to no authority to the contrary of that proposition in its application to the present case. The *Prichard*, *Holland*, and *Read* cases do not have any necessary application to the question. The reasoning there was had in reference to their contexts, to which it was very apt; and the relief of the provision relating to the Tilden Trust from the alternative ulterior provision which embraces only indefinite objects denies to those cases any practical application to the questions presented in the case at bar. While the statute abolished powers as they before then existed (1 Rev. St. p. 732, § 73), it, as said by Judge ANDREWS in *Read v. Williams*, "does not define all the purposes for which a power over property may be created." This appears by section 74, before referred to, and by the reviser's notes (3 Rev. St., 2d ed. 590), as to powers other than those which are designated as beneficial. They, except as there enumerated, were abrogated by the statute. (1 Rev. St. 733, § 92.) Treating that in question as a trust power, those considerations of the statute may not be essentially important here. It must be assumed that the testator, through powers conferred on his trustees by the thirty-fifth article, intended to dispose of his entire residuary estate, and therefore its ultimate dispositional provision (in view of article 39) was intended, as by its

terms it purported, to be imperative, but that character was not unconditionally applicable to the power or appointment and disposition in the primary provision relating to the Tilden Trust. It had relation to the limitation over to the objects of the ulterior provision, and, in consequence of the invalidity of the latter, his intention, if the trustees had failed to appoint the Tilden Trust as the beneficiary, would have been disappointed. The purpose of the appointment and disposition to that institution is apparently legal, and at common law may have lawfully been accomplished through the execution of a power in the manner the testator sought by his will to do it. It also fairly comes within the purposes for which a power, as defined by the statute, may be employed. (Id. § 74) At common law a trust may have been attended with a discretionary power, upon the non-execution of which the enforceable character of its ultimate limitation might be dependent. This relation of powers to which trusts have been subjected was preserved and provided for by the statute; and, while a trust power is in its nature imperative, that character of it, in the sense of being enforceable, may, when its execution or non-execution is made expressly to depend upon the will of the donee, be suspended by and during the existence of such discretionary power or determined by its execution. In the present case, there was involved in the provision for the Tilden Trust a power in its terms discretionary; and so its execution or non-execution was made expressly to depend on the will of the trustees, and the purpose being lawful, it was valid, unless in contravention of the statute against perpetuities. It is urged that the limitation provided for by the thirty-fifth article of the will would permit the unlawful suspension of the absolute power of alienation of the realty and of the absolute ownership of the personal property constituting the residuary estate of the testator. (1 Rev. St. 723, § 15; Id. 773, § 1.) This would be so, and its effect the invalidity of the limitation, if such suspension would not by the terms of the will necessarily terminate within a period not longer than the continuance of the

life of the survivor of the two persons there designated. (*Schettler v. Smith*, 41 N. Y. 328.) But the thirty-fifth article must be construed in connection with the thirty-ninth article, and by the latter the testator directed that the executors and trustees "possess, hold, manage, and take care" of the residuary estate during a period not exceeding such two lives. This, in view of the further direction that they apply such estate to the objects and purposes mentioned in the will, which was imperative, is not consistent with the suspension of the absolute power of alienation of the real estate, and of the absolute ownership of the personal property beyond that period. It therefore seems that the future estates sought to be created by the testator were so limited that by the terms of those provisions they would necessarily, and beyond any contingency, have terminated within the period prescribed for that purpose by the statute, and in that respect they may be upheld.

These views lead to the conclusion that the provisions of the will relating to the Tilden Trust, and the powers for their execution, given to the executors and trustees, were valid, and, as the consequence, the main purpose of the action must fail.

Since the commencement of the action, and upon the application of the executors and trustees, a Tilden Trust has been incorporated in form and manner satisfactory to them, and organized. They determined to endow it with the entire residuary estate, and made to the institution conveyance and transfer accordingly, subject to provisions contingently made in the will by the testator in behalf of special trusts by him created, and as there directed.

It is insisted that the act of incorporation is not such as was intended by the testator, in that it was not given the corporate capacity designed by him, and for the further reason that it designated the executors and testamentary trustees as permanent trustees of the institution. By the will he requested them to obtain "an act of incorporation of an institution to be known as the 'Tilden Trust,' with capacity to establish and maintain a free library and read-

ing-room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number; and, in case said institution be incorporated, * * * I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof," etc. In the preamble of the act of incorporation it is stated that the "executors and trustees deem it inexpedient to designate any purposes of the corporation * * * other than the establishment and maintenance of a free library and reading-room in the city of New York, in accordance with the purpose and intention of the said testator," and such was the capacity given by the act to the corporation. The first section provided that the three persons (naming them) who were the executors and trustees, and such other persons as they should associate with themselves, and their successors, were created a body corporate, under the name and title of the "Tilden Trust;" and by the second section it was provided that those three persons should be permanent trustees of such corporation, and that they designate and appoint other trustees, so that the number should not be less than five.

The testator seems to have had in view only one definite purpose of the corporation. That he expressed. Beyond the establishment and maintenance of a free library and reading-room, he contemplated that the promotion of some further scientific and educational objects might suitably and properly be added and sustained. He therefore provided that the corporate capacity be adapted to such objects in that respect as the executors and trustees should designate. This, however, would be dependent upon circumstances to be determined by them, and he left it to their discretion. He evidently did not intend that the corporation for the purpose by him definitely appointed should be frustrated by the failure of the executors and trustees to exercise their discretion in such manner as to give occasion

to amplify the corporate capacity of the institution. The question whether, after the creation of the corporation for the free library and reading-room, the executors and trustees may, by the designation of such further objects, authorize the enlargement of its capacity accordingly, does not now arise, and is not considered.

We think the incorporation was not invalidated by the manner the capacity of the institution was defined in the act.

When the plaintiff commenced this action it may have had support in the invalidity of the ulterior provision of the thirty-fifth article of the will to prevent the application of any portion of the estate to the indefinite objects and purposes there mentioned. But, as the executors and trustees afterwards made a determination which would prevent the application of any part of the fund to those objects and purposes, no relief in that respect is now essential; and the only purpose for which further consideration need be given to that subject has relation to the question of costs, which we think should, on behalf of the several parties, be chargeable to the estate of the testator. The judgment of the court below should therefore be reversed, and the complaint dismissed, with costs in that and this court to all parties, appellants and respondent, payable out of the estate.

All concur with BROWN, J., except POTTER and VANN, JJ., who concur with BRADLEY, J.

As to the validity of trusts for charitable purposes as depending on the definiteness and certainty of the objects and beneficiaries, see *Haines v. Allen*, 78 Ind. 100; 2 Am. Prob. Rep. 242; *Simpson v. Welcome*, 72 Me. 496; 2 Am. Prob. Rep. 248; *Nichols v. Allen*, 130 Mass. 211; 2 Am. Prob. Rep. 369; *Hesketh v. Murphy*, 86 N. J. Eq. 804; 3 Am. Prob. Rep. 7; *Matter of Schouler*, 134 Mass. 426; 3 Am. Prob. Rep. 249; *Goodale v. Mooney*, 60 N. H. 528; 4 Am. Prob. Rep. 1; *Fairchild v. Lawson*, 50 Conn. 501; 4 Am. Prob. Rep. 36; *Pritchard v. Thompson*, 95 N. Y. 76; 4 Am. Prob. Rep. 92; *Coit v. Comstock*, 51 Conn. 353; 4 Am. Prob. Rep. 164; *Barnum v. Mayor of Baltimore*, 62 Md. 275; 4 Am. Prob.

Rep. 291; Quinn v. Shields, 63 Iowa 129; 4 Am. Prob. Rep. 386; 17 N. W. Rep. 437; Sowers v. Cyrenius, 39 Ohio St. 29; 4 Am. Prob. Rep. 542; Webster v. Morris, 66 Wis. 366; 5 Am. Prob. Rep. 158; 28 N. W. Rep. 353; Tappan's Appeal, 52 Conn. 412; 5 Am. Prob. Rep. 193; Beardsley v. Selectmen of Bridgeport, 53 Conn. 489; 5 Am. Prob. Rep. 298, and note 303; 3 Atl. Rep. 557; Bristol v. Bristol, 53 Conn. 242; 5 Am. Prob. Rep. 332, and note 340; 5 Atl. Rep. 687; Holland v. Alcock, 108 N. Y. 312; 6 Am. Prob. Rep. 188; 16 N. E. Rep. 305; Hunt v. Fowler, 121 Ill. 269; 6 Am. Prob. Rep. 444, and note 453; 17 N. E. Rep. 491; Minot v. Baker, 147 Mass. 348; 7 Am. Prob. Rep. 48; 17 N. E. Rep. 839; Howe v. Wilson, 91 Mo. 45; 7 Am. Prob. Rep. 867, and note 372; 8 S. W. Rep. 390; Rhodes v. Rhodes, 88 Tenn. 637; 7 Am. Prob. Rep. 468; 13 S. W. Rep. 590.

As to the application of the *Cy. Pres.* doctrine, see note to Beardsley v. Selectmen of Bridgeport, 5 Am. Prob. Rep. 298, 305; Bristol v. Bistol, id. 332, 340; Kinney v. Kinney, 86 Ky. 610; 6 Am. Prob. Rep. 153; 6 S. W. Rep. 593; Holland v. Alcock, 108 N. Y. 312; 6 Am. Prob. Rep. 188; 16 N. W. Rep. 305; Doughten v. Vandever, 5 Del. Ch. 516; 1 Am. Prob. Rep. 392; Minot v. Baker, 147 Mass. 348; 7 Am. Prob. Rep. 48; 17 N. E. Rep. 839; Stratton v. Physio Medical College, 149 Mass. 505; 7 Am. Prob. Rep. 55; 21 N. E. Rep. 874.

As to what are public charitable or religious uses, see Rhymer's Appeal, 93 Pa. St. 142; 2 Am. Prob. Rep. 171; Simpson v. Welcome, 72 Me. 496; 2 Am. Prob. Rep. 248; Manner v. Philadelphia Library Company, 93 Pa. St. 165; 2 Am. Prob. Rep. 165; Piper v. Moulton, 72 Me. 155; 2 Am. Prob. Rep. 574, and note 586; Hesketh v. Murphy, 36 N. J. Eq. 304; 3 Am. Prob. Rep. 7; Matter of Schouler, 134 Mass. 426; 3 Am. Prob. Rep. 249; Goodale v. Mooney, 60 N. H. 528; 4 Am. Prob. Rep. 1; Coit v. Comstock, 51 Conn. 352; 4 Am. Prob. Rep. 164; Webster v. Morris, 66 Wisc. 366; 5 Am. Prob. Rep. 158; 28 N. W. Rep. 353; Tappan's Appeal, 52 Conn. 412; 5 Am. Prob. Rep. 193; Dascomb v. Marston, 80 Me. 223; 6 Am. Prob. Rep. 248; 13 Atl. Rep. 888; Kinney v. Kinney, 86 Ky. 610; 6 S. W. Rep. 593; Stratton v. Physio Medical College, 149 Mass. 505; 7 Am. Prob. Rep. 55; 21 N. E. Rep. 874.

As to the validity of gifts to nonexistent bodies, see Coit v. Comstock, 51 Conn. 352; 4 Am. Prob. Rep. 164; Tappan's Appeal, 52 Conn. 412; 5 Am. Prob. Rep. 193; Dascomb v. Marston, 80 Me. 223; 6 Am. Prob. Rep. 248; 13 Atl. Rep. 888; Cruikshank v. Home for Friendless, 113 N. Y. 337; 6 Am. Prob. Rep. 490, and note 498; 21 N. E. Rep. 64; and Hayes v. Pratt. *infra*.

SCOTT vs. RAUB.

[88 Virginia, 721.]

SLAVERY—MARRIAGE—LEGITIMACY OF CHILD.

A common law marriage could not be consummated between persons one of whom was at the time a slave.

A child born in 1862 of a slave mother, the father being a free colored man, the parents at the time and until the death of the mother in 1864, living together as man and wife, the father recognizing and educating the child, is entitled to inherit from the father, under Const. Va. art. 11, § 7, providing that a child of parents either or both of whom were slaves at and during the period of their co-habitation, shall inherit the estate of the father as though born in lawful wedlock, if the father recognized it as his child and the mother as his wife, and under Act, February 27, 1866, § 2, declaring legitimate the children of colored persons who previous to the passage of the act have undertaken and agreed to occupy the relation of husband and wife and as such cohabit at the time of its passage, or whose cohabitation has ceased by reason of the death of the mother prior to its passage.

The degree of colored blood in such child or its parents is immaterial, the mother being a slave and both parents belonging socially to the class known as colored persons.

SUIT by Sarah E. Raub against Robert Scott to recover an interest in certain real estate. Decree for plaintiff. Defendant appeals.

Duke & Duke, for appellant.

Geo. Perkins and *Thos. S. Martin*, for appellee.

LACY, J.—The case is as follows: Sarah E. Raub, the appellee, a woman of color, filed her bill in the said court against the appellant, Robert Scott, for partition of the real estate which had been held jointly by the defendant and his deceased brother, James Scott, who were the sons of Jesse Scott, deceased. The complainant claimed to be, as the only child of James Scott, deceased, entitled to the undivided one-half of the said land, which had belonged to him. But the defendant denied that she was the legitimate child of said James Scott, and entitled to the said

land as such, and claimed it all for himself as the sole surviving brother of the said James Scott, deceased. The facts appeared by depositions to be that Jesse Scott was the owner of the said real estate, and that his two sons, Robert and James, inherited the same from him. That they had jointly occupied the said land up to the time of the death of James, which occurred in 1888. That in 1861, one Ann Settles, a slave woman, was hired as a domestic in the house of James Scott, himself a free person of color, and soon after cohabitation was had between the said freeman and the slave woman of color. In 1862 the appellee was born of this intercourse, and in 1864 Ann died, but the child was retained in the house by James, and recognized as his child, and reared to womanhood by him, and subsequently married a man named Raub. In 1888 James died intestate.

There is some conflict on the subject, but the evidence tends to show that these people, both James and Ann, had less than one-fourth of negro blood.

The Circuit Court at the hearing held that a common-law marriage had been had and solemnized between James and Ann, and that the plaintiff, the issue of the marriage, was capable of inheriting, and so took the father's real estate of which he died intestate; and also that as Ann was a slave, and was recognized by James as his wife, and that as after the death of Ann, and after the passage of the act of February 27, 1866, he recognized the said issue of the marriage, Sarah, the plaintiff, as his child, she was thus made legitimate; and decreed according to the prayer of the plaintiff's bill; whereupon the appellant, Scott, applied for and obtained an appeal to this court.

1. As to the supposed common-law marriage between James and Ann; as one of the parties to the alleged contract of marriage was a slave, there could be no such contract entered into.

A slave cannot marry, because he cannot make a valid contract, because the duties of a slave are inconsistent with the duties of a husband or wife, and because a slave is

property. So the marriage of a slave is a mere nullity, though it is allowed a certain moral effect. (14 Amer. & Eng. Enc. Law, 497, and authorities cited. In *Hall v. U. S.* (92 U. S. 27, 30), it is said: "It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage." And in *Malinda v. Gardner*, (24 Ala. 719), it is said: "The father and mother were slaves, and such persons are incapable of contracting marriage, because that relation brings with it certain duties and rights, with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract are necessarily incompatible with the nature of slavery."

"A slave, being property, has not the legal capacity to make a contract, and is not entitled to the rights nor subjected to the liabilities incident thereto." (*Howard v. Howard*, 6 Jones, [N. C.] 235.)

2. But, as has been said, such a marriage is allowed a certain moral force, and may be confirmed after emancipation. In most states there are statutes relating to this subject, which it is said was an important one once, but is now no longer important, except as history. (*Stike v. Swanson*, 44 Ala. 633; *McReynolds v. State*, 5 Cold. 18; *Francis v. Francis*, 31 Grat. 283.)

In the Constitution of this state, art. II, § 7, it is provided that "the children of parents, one or both of whom were slaves at and during the period of cohabitation, and who were recognized by the father as his children, and whose mother was recognized by such father as his wife, and was cohabited with as such, shall be as capable of inheriting any estate whereof such father may have died seised or possessed as though they were born in lawful wedlock."

And by the second section of the act of February 27, 1866, it is provided: "Sec. 2. That when colored persons, before the passage of this act, shall have undertaken and agreed to occupy the relation of husband and wife, and

shall be cohabiting together as such at the time of its passage, whether the rights of marriage have been celebrated between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges and subject to the duties and obligations, of that relation, in like manner as if they had been duly married by law, and all their children shall be deemed legitimate, whether born before or after the passage of this act; and, when the parties have ceased to cohabit before the passage of this act in consequence of the death of the woman, or from any other cause, all the children of the woman recognized by the man to be his shall be deemed legitimate." (Acts 1865-66, p. 85.)

This act was construed by this court in the case of *Francis v. Francis*, *supra*. Judge STAPLES, in that case, in an able opinion, said: "It is insisted that the parties to this suit, although they were colored persons, and living together as man and wife at the time of the passage of this act, are not within the influence of its provision, inasmuch as they were free before the war, and might have been lawfully married under the laws then in force; that the sole object of this legislation was to provide a remedy for persons emancipated by the war, who, being slaves, could not legally contract the marriage relation, and who, from want of proper information, even after freedom acquired, might not understand the necessity and propriety of so doing. The words include all colored persons, no matter how or when their freedom was acquired. The next question is as to the character of proof requisite to show that the parties are within the statute. It has been very properly said it was not the intention of the legislature to force upon persons the relation of husband and wife against the consent of either. It must appear that they have agreed to occupy that relation. The fact that they have so agreed is, however, not always susceptible of direct proof. The courts must in many cases infer it from the circumstances. It is not necessary that the parties shall have expressly agreed to live together as husband and wife. The agree-

ment or understanding may be implied, as in other cases, from their conduct and declarations. In the present case," says Judge STAPLES, "there is no positive proof of an express agreement of the appellant and the appellee to occupy the relation to each other of husband and wife, but the circumstances tending to show implied understanding of that sort are almost as satisfactory as the direct testimony of unimpeached witnesses to the fact. It appears that they lived together in the house of the appellant as early as the year 1852, and so continued down to the year 1868."

And Judge WINGFIELD, of the Special Court of Appeals of Virginia, in the case of *Colston v. Quander*, reported in 1 Va. Law J. 689, speaking of the marriage of a free man of color to a slave woman of color in 1842, and construing the effect of the clause adopted April 7, 1864, in the Alexandria constitution of the Pierpont government, as it is called, the said marriage having been solemnized by a minister of the gospel with the consent of the master of the slave, said: "Marriage is a civil contract, and may be entered into by all unmarried persons who have the physical, mental, and legal capacity to contract it; yet, like all other contracts, to make the contract of marriage valid it must be entered into by the mutual consent of parties having the mental and legal capacity to enter into it, and, if this is wanting in either party, the marriage is void, unless ratified by such party after the disability is removed; but, if so ratified after the competency of the party is attained or restored, the marriage is valid and binding on the parties, and they need not be married again;" citing Bish. Mar. & Div. §§ 55, 189.

As far back as 1819, the Supreme Court of Louisiana, in the case of *Girod v. Lewis*, (6 Mart. [La.] 559), held that, "while a slave had no legal capacity to assent to a contract, with the consent of their masters they might marry, and had the moral capacity to enter into such a connection; yet, while they remained in a state of slavery, it could produce no civil effect. Emancipation gave to the slave his

civil rights, and a contract of marriage valid and legal by the consent of the master, and moral assent of the slave, from the moment of freedom (although dormant during slavery) produced all the effects which result from such contracts among free persons." See, also, *Johnson v. Johnson*, 45 Mo. 595; *McReynolds v. State*, *supra*.

These cases proceed upon the effect of emancipation upon such a contract *proprio vigore*, Judge WINGFIELD resting the question upon the emancipation clause of the Constitution in force over the country in which the parties resided, and passing by the act of February 27, 1866, as not needed for his purposes, and making no reference to the eleventh article of the Virginia Constitution, *supra*.

It is clear that under the act of February 27, 1866, as construed by Judge STAPLES, speaking for this court, in *Francis v. Francis*, and the eleventh article of the Virginia Constitution, the appellee, who was the issue of a slave woman by a free man, who acknowledged her as his wife, and recognized the issue of the cohabitation as his child after April, 1866, and after the adoption of the Constitution, was rendered legitimate, and capable of inheriting, and did inherit, the land in dispute.

The discussion of the degree of colored blood in said appellee is unprofitable. She was a slave, and, being a slave, the law (article II, § 7, Const. Va.) applied to her, and to her offspring mentioned herein, whether she had three-fourths or any greater amount of white blood.

Her mother was the slave of one Moon, who provided by his will that his slaves should be hired out until one named had been redeemed, as he called it, and enough realized to send them all to a free state; and that, until such amount had been realized so as to carry out his will in full and fair effect, they should be kept here and hired out. The woman Ann, under our law as it then was, followed the *status* of her mother, and was a slave. (Ch. 103, §§ 1-17.)

The statute relied on by the counsel, (section 9, c. 103, Code 1860), providing that "every person who has one-fourth part or more of negro blood shall be deemed a mul-

atto, and the word 'negro' in any other section of this or any other statute shall be construed to mean mulatto as well as negro," has no application to any slave, but was intended to apply only to free negroes. The condition of slavery fixed the civil *status* of any such person as was a slave, and the offspring of the female slave followed the *status* of the mother, irrespective of any admixture of white blood whatever, and this is apparent by an inspection of the statutes of the Code. Slaves are always referred to as such, and the word "negro" is used only with respect to free negroes.

Section 17, c. 108, Code 1860, is as follows: "The court of any county or corporation, upon satisfactory proof by a white person of the fact, may grant to any free person of mixed blood a certificate that he is not a negro, which certificate shall protect such person against the penalties and disabilities to which free negroes are subject as such;" by which they became entitled to be tried as white persons, were allowed to give testimony in courts of justice against white persons, etc. (*Dean v. Com.*, 4 Grat. 541), where both of these sections were given effect.

Construing the act of February 27, 1866, in *Francis v. Francis*, *supra*, Judge STAPLES says the law was intended to apply to all classes of colored persons. These parties were both classed as colored persons, socially speaking, associated with colored persons, attended schools established for colored children, attended and joined a church established and attended by colored persons generally, and the law should be liberally construed. We will consider what was the defect and mischief against which the existing laws did not provide, what remedy has been provided by our law-makers to cure the defect and prevent the mischief, and the true reason of the remedy. It is the duty of the courts at all times to make such construction as should suppress the mischief and advance the remedy. A remedial act should be so construed as most effectually to meet the beneficial end in view, and prevent a failure of the remedy. It is a general rule that a remedial statute

should be construed liberally, and a statute made *pro bono publico* should be so construed that it may, as far as possible, attain the end proposed. The act of February 27, 1866, speaks of colored persons, and the act of 1865-66, c. 17, § 1, p. 84, defines what a "colored person" is, as follows: "Every colored person having one-fourth or more of negro blood shall be deemed a colored person."

The Constitution of Virginia, art. 11, § 7, provides for slaves by that name; but it is contended that under our statutes in force at that time, and referred to above, James was not a negro or mulatto, but a person of mixed blood, and so in contemplation of law a white man; and that neither James nor Ann were colored persons, as defined above; and that the statute of February 27, 1866, did not, therefore, apply to them, and that the constitutional provision could not apply for the same reason, as far as James was affected. But the evidence shows that, independent of the slavery of the woman, they were socially of the class known as "colored persons," and, when words are capable of a twofold construction in statutes, the rule is to adopt such a construction, and such interpretation, *ut res magis valeat quam pereat*, and the words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and proper use, for *jus et norma loquendi* is governed by usage; and the meaning of words, spoken or written, ought to be allowed as it constantly has been taken; and we concur with Judge STAPLES' views as expressed in his clear and able opinion cited above, that this act was intended to apply to all classes of colored persons, and is applicable to the parties here, irrespective of the degree of their color, if they belonged to the class mentioned—to-wit, colored persons—as they evidently did.

Again, there is no clear proof offered, and probably none attainable, as to the degree of colored blood possessed by either; one witness saying the woman had more than one-fourth negro blood, and as to the man that "he was a colored man. I base my opinion upon the privileges he

enjoyed; he voted when other colored people vote, and not before;" and of the woman, Ann, also that she always passed as a colored person. It never has been questioned. We have not gone into the evidence in detail of the recognition by the husband and father of the wife and child. It is established clearly by entries in the family Bible, made by the husband and father, registering the death of the wife and the birth of the child, and by an unbroken line of conduct, and by plain words as well. We are of opinion that the appellee is therefore, in legal contemplation, the legitimate child of James Scott, and is entitled, by inheritance, to the real estate in dispute, which was his; and, the decree of the Circuit Court of Albermarle having so decided, the same is right, and must be affirmed.

Under the Florida statute the children of slave marriages that terminated before emancipation and were never recognized thereafter, have no inheritable blood. *Williams v. Kimball*, 16 So. Rep. 783.

As to legitimization of children by the subsequent marriage of their parents, see *Adams v. Adams*, *supra*, and note; by acknowledgment of father, see, *Blythe v. Ayres*, *supra*.

JOHN DICKISON *vs.* WILLIAM B. DICKISON, *Exr.*

[138 Illinois, 541.]

WORDS OF EXCLUSION—RESIDUARY DEVISE.

A son to whom testator makes a devise "to be in full of his portion of my estate" is not entitled to share under a subsequent clause of the will directing the sale of the residuary estate and the payment of the proceeds, one-third to the widow and the other two-thirds among the children in equal proportions.

ERROR to Appellate Court, Second District.

Application by John A. Dickison to County Court for order allowing him to share in the estate of Griffith Dicki-

son, deceased, which was disallowed, the order of disallowance being affirmed by the Appellate and District Courts.

McCulloch & McCulloch, for the appellant.

Arthur Keithley, for the appellee.

SHOPE, J.—April 9, 1874, Griffith Dickison, then in life, made his last will and testament. At that time, it is conceded for the purpose of this appeal, he had ten children. In and by clauses 2 to 8, inclusive, and clause 10 of the will, he made specific devises to his wife and eight of the children, severally. By clause 9 he made a specific devise to his two other children as follows:

“*Ninth.* To my children John Abraham and Mary Ann I will, devise, and bequeath the west half of the north-west quarter of section twenty-seven, in township ten north, range seven east, in equal shares, to be in full of their portions of my estate, both real and personal, to be theirs, their heirs’ and assigns’ forever.” The eleventh clause of the will is as follows:

“*Eleventh.* All the rest of the real estate of which I may die possessed shall be by my executor sold, also all the personal property I may have at my death shall be sold, and from the proceeds of such sales he shall first pay all my debts, etc. The remainder he shall divide amongst my heirs as follows: To my wife, Sarah A. Dickison, one-third part thereof, and the remainder to my children in equal portion, share and share alike, to be theirs, their heirs’ and assigns’ forever absolute.” On the 7th day of March, 1882, there was executed by the testator in due form of law, and attached to the original will, the following codicil:

“Whereas, I, Griffith Dickison, did on the 9th day of April, 1874, make my last will and testament, in and by which will I made devises to all my children then born; and whereas, since that date a son has been born to me, whom I have named Fred, I make this codicil to my said will, to have the same force and effect as if it was a part of my original will, that is to say, I will, devise, and bequeath

to my son Fred (certain described realty) in fee, and to my daughter Roxie J. Hitchcock (certain prescribed realty) in fee."

The testator died March 14, 1886, and shortly thereafter said will, with the codicil annexed, was duly admitted to probate. Subsequently the executor reported to the County Court that after payment of all claims, etc., he had in his hands \$9,214.05 for distribution under the residuary clause of the will, and asking an order of the court thereon.

The question presented by this record is whether appellant, John A. Dickison, is entitled to participate in the distribution of that fund. That he was a child of the testator, and therefore fell within the designation of persons who were to take under the residuary clause of the will, is conceded. It must, therefore, be held that he is a distributee thereunder of the residuum in the hands of the executor, unless that clause is controlled by other portions of the will, so as to exclude him from participation, and this must depend upon the intention of the testator as expressed in his will. The sole purpose of construction of the instrument is to find and declare the intention of the testator, that effect may be given to such intention, when not contrary to public policy, or in contravention of law or the rules of property. The construction depends upon the intention of the testator, to be ascertained from a full view of everything contained in the will giving just weight and operation to each clause and word employed, unless there is some invincible repugnance, or some portion of it is absolutely unintelligible. (1 Redf. Wills, 334 *et seq.*; *Caruthers v. McNeil*, 97 Ill. 256; *Kennedy v. Kennedy*, 105 Ill. 350; *Taubenhan v. Danz*, 125 Ill. 529; 17 N. E. Rep. 456, and cases cited.)

By the ninth clause of his will the testator devised to John A. (appellant) and Mary Ann, his son and daughter, as tenants in common, the tract of land therein described, "*to be in full of their portion of my estate, both real and personal; to be theirs, their heirs' and assigns' forever.*" The language here employed is neither ambiguous nor un-

intelligible. If understood in their ordinary and popular significance, as they must be, except where technical terms are used, the words convey a definite and certain meaning. The word "portion" in its commonly accepted meaning, is the equivalent of part, share, or division. (Worcester's Dic.) "To be in full of their part or share or division of an estate," means to be the complete measure of such share, part, or division. (Worcester.) The evident intention of the testator was that the land devised was to be the complete measure of what these devisees should take or receive as their part, share, division, or portion of his estate.

Nor is the construction less satisfactory if it be considered that the testator used the word "portion" in its technical legal sense. Technically a "portion" is defined to be: "The part of a parent's estate, or of the estate of one standing in the place of a parent, which is given to a child." (Bouvier.) The devise would therefore be in full,—*i. e.*, the complete measure of the part of the testator's estate given or devised, or the provision made by the testator for these devisees.

The evident intention of the testator, as manifested by this clause of the will, was to limit the quantity of his estate to be taken or received by his son John A. and his daughter Mary A. to the specific devise of the land mentioned in clause 9. This intention is clearly and unambiguously expressed. The difficulty arises, however, not in respect of any uncertainty as to the intent expressed in this clause of the will, but because of the repugnancy existing between this and the eleventh, or residuary, clause. The latter clause provides, as we have seen, that all the rest and residue of the testator's real estate, not specifically devised, and all his personal estate, shall be sold by his executors, and, after paying debts, etc., the remainder be divided among his heirs as follows: To his wife, one-third part thereof; "and the remainder to my children in equal portions, share and share alike, their heirs and assigns, forever, absolute." It will be observed that the testator here again uses the word "portion" as the equivalent of part or share.

It is apparent that if appellant and his sister Mary A. are held to be included in this general residuary clause, the provision of clause 9, that the land therein devised shall be in full of all they shall receive from the estate of the testator, is rendered nugatory. There is, therefore, it is said, repugnance between these two clauses, and that in such case the latter provision must control. The rule is well established in this state, as elsewhere, that when the clauses of a will are irreconcilable, and the repugnance invincible, the latter clause will generally prevail. (*Brownfield v. Wilson*, 78 Ill. 470; *Murfitt et al. v. Jessop*, 94 Ill. 158; 3 Jarm. Wills, 705; 1 Redf. Wills, 443-445.)

In matters of so great solemnity as making a testamentary disposition of property it cannot be presumed that a testator would purposely make inconsistent provisions, incapable of being carried into effect. Unlike conveyance by deed, in which the first complete grant leaves nothing in the grantor to be subsequently conveyed, a will remains ambulatory, and the latest expressed intention is to be given operation; and, as the testator might have changed his mind during the drafting of his will, there being no way of accounting for or removing the repugnancy, it will be presumed that he did, after writing the former clause, change his purpose, and that the subsequent clause gives expression to a latter formed intention. The rule is adopted by the courts as an aid to finding the real intention of the testator, as finally expressed in his will, and arises out of the very necessity of the case, and rests upon the single presumption of fact of change of intention while writing the will. The fundamental rule of construction being, as we have seen, that the intention is to be found from a consideration of the whole will, and such construction given as will uphold all of its provisions, and give to each clause and part its just operation and effect, it follows that the presumption of the fact upon which the rule is predicated will never be indulged, or the rule applied, until it is found by the application of all other rules of construction that the difficulty is unsolved, and the clauses remain invincibly re-

pugnant. (Redf. Wills, 445-452, and cases cited; *Morrall v. Sutton*, 1 Phil. Ch. 532.)

The tendency—of modern American decisions at least—is towards reconciling the apparent repugnancy, if possible, without adopting unreasonable or absurd constructions; so much so, that it is stated by the learned author just cited “that it is now becoming very uncommon with us to hear a court declare a will, or any of its provisions, wholly inoperative by reason of repugnancy or uncertainty.” (Page 453.) The rule, therefore, which sacrifices the former clause, because inconsistent with a later one, is never applied, except upon a failure to give such construction as renders the whole will effective, and allows each provision to stand. Hence it has been held that to enable the court to uphold all the provisions of the will it is permissible to resort to every reasonable intendment,—to reverse the relative order of the devises or bequests; and to transpose the different provisions of the will, if it be possible thereby to render them consistent and give effect to each. (*Mutter's Appeal*, 38 Pa. St. 314; *Covenhoven v Shuler*, 2 Paige, 122; *Pruden v. Pruden*, 14 Ohio St. 251; *Langham v. Sanford*, 19 Ves. 641; *Brocklebank v. Johnson*, 20 Beav. 205; *Ridout v. Dowling*, 1 Atk. 419; *Hatfield v. Snider*, 42 Barb. 615; *Crissman v. Crissman*, 5 Ired. 498.) And so repugnant words, in whatever portion of the will they occur, which contravene the evident general purpose and intention of the testator as clearly expressed, may be rejected or transposed or limited and controlled by other and prior provisions, and by the general purpose and intent thus clearly manifested. (*Holliday v. Dixon*, 27 Ill. 33; *Watlington v. Walton*, 4 De Gex. M. & G. 259; *Boon v. Cornforth*, 2 Ves. Sr. 277; *Jones v. Price*, 11 Sim. 557.)

Further discussion of the general rule will be unnecessary, as we are not required to go to so great length in the construction of this will as many of the cases have gone.

It is also a familiar rule in the construction of wills that general provisions in a will must give way to specific provisions, where there is a general devise of property in one

part of the will, and a specific disposition of the same property in another part, these are to be regarded, generally, as excepted out of the general devise. (Redf. Wills, 446, and cases cited.) Moreover, a general residuary clause, being ordinarily introduced by the testator to prevent intestacy as to any part of his estate, will be generally construed as intended for nothing more than a disposition of those portions of the estate not previously disposed of; and in such case the presumption of a change of purpose in the testator's mind while preparing his will cannot arise. (Id.) The specific directions of the will, where the mind of the testator has been directly and intelligently directed to them, are much safer guides to his intention than general provisions, which do, by virtue of their generality, contravene the specific provision, but which might or might not have been so intended; and especially is this so where, as in this case, the general provision is a residuary clause, which, as we have said, might, as it generally is, have been inserted with the sole view of the disposition of any residuum of the estate not before devised. Here the testator made specific devises to all his children of land, and accompanied the devise to appellant and his sister Mary Ann with the express provision that the land devised was to be in full of their portion of his estate, both real and personal. Nothing can be clearer than the intention, thus expressed, that neither appellant nor Mary A. should participate in the estate of the testator further than the specific devise made to them. It was to be, as we have seen, the complete measure of all they should take out of the estate of the testator, "both real and personal," excluding them from further participation. Following this clause comes a specific devise of other lands, without limitation, to another son, Griffith A., and then follows the general clause before quoted. By that clause the residue of the testator's property, real and personal, is to be sold, and, after the payment of debts, to be divided, one-third to the testator's widow, Sarah A. Dickison, and the remainder to his children, share and share alike. It is apparent that in making this clause the testa-

tor intended especially to provide for his wife, giving her one-third of the residue, which she could not otherwise, as his widow, have taken without renouncing the previous specific provision for her benefit. The care taken in naming her evinces the solicitude of the testator in her behalf, undoubtedly arising from the fact, as shown by the records, that no formal marriage had been solemnized between them, and at most a common-law marriage only existed, which might be contested. Beyond the naming of his then wife, no one else is named. The remainder of the residue is to be divided among his children without further designation. There are no other words indicating an intention to abrogate or destroy the limitation coupled with the devise to appellant. It is much more probable that the testator introduced the residuary clause primarily to protect his widow, and, secondly, to give effect to the limitation coupled with the devise in the ninth clause of the will by preventing any portion of his estate from becoming intestate estate, and distributable to his heirs, including appellant, than that he had changed his purpose after the writing of the second preceding clause. Especially is this so when we consider that all that portion of clause 9 repugnant to the residuary disposition could have been erased or expunged without in the least affecting the specific devise made.

The intention of the testator must control when it can be ascertained, and we are of the opinion that it is clearly manifest that the testator intended to exclude appellant from participation in his estate beyond the specific devise made to him; that the will, taken and considered as a whole, leaves no serious doubt of that intention. The testator had just previously excluded appellant from participation in any residue of his estate then existing or thereafter to be acquired, and undoubtedly, having in mind this provision subject to it.

Nor is this rendered less certain by the codicil made by the executor. It is true that he therein says that he had, in and by his will, "made devises to all my children then born," but the purpose of the codicil, and to what devises

the testator referred is clearly apparent. Thereby he makes a specific devise to a son born subsequently to the making of the original will, and of the same kind as those specifically made to his other children. Indeed, he takes by the codicil the land specifically devised to his daughter Roxie by the will, and gives it to the after-born son, and in lieu thereof specifically devised another tract of land to the daughter. He had, as is said in the codicil, by his will made devises to all of his children. He had specifically devised to each a tract or tracts of land, as he was then doing for his younger son, born after the making of the will, and to such specific devises alone the language of the codicil may be referred. It was these he manifestly had in mind, and to which his attention was attracted, in making like provision for his other and after-born child.

We are of the opinion that the provisions of this will clearly evince an intention to exclude appellant from participation in any residue of his estate, and that the appellate court held correctly in excluding him from participating therein.

The judgment of the appellate court affirming the decree of the circuit court is affirmed.

Exclusion of heir.—In *Sullivan v. Straus* (161 Pa. St. 145; 28 Atl. Rep. 1020), the testator after stating his reason for disinheriting his son John, said: "It must be perfectly understood that all of my estate belongs to my children and grand-children," and it was held that John and his children were not to be included within the designated class; but the general rule is that an heir or next of kin cannot be disinherited by mere words of exclusion. The property must actually be given to some one else by express words or by necessary implication. *Denn v. Gaskin*, Cowp. 657; *Sykes v. Sykes*, L. R. 4 Eq. 200; *Allen's Ex'r v. Allen*, 59 U. S. (18 How.) 385; *Wright v. Hicks*, 12 Ga. 155; *Clendenning v. Lanius*, 3 Ind. 441; *Phillips v. Phillips Adm'r*, 93 Ky. 498; 20 S. W. Rep. 541; *Lynes v. Townsend*, 33 N. Y. 558, 560; *White v. Howard*, 46 N. Y. 144; *Chamberlain v. Taylor*, 105 N. Y. 185; 5 Am. Prob. Rep. 510, 512; 11 N. E. Rep. 630; *Gallagher v. Crooks*, 123 N. Y. 338; 30 N. E. Rep. 746; *Schauber v. Jackson*, 2 Wend. 13; *Haxtun v. Cores*, 2 Barb. Ch. 506, 521; *Van Kleek v. Dutch Church*, 6 Pac. 600; *Clayton v. Clayton*, 3 Binney, 481; *Hitchcock v. Hitchcock*, 35 Pa. St. 393; *Hancock's Appeal*, 112

Pa. St. 532; Will of Rorer, 7 Phila. 524; Gorgas' Estate, 3 Pa. Dist. Rep. 360; Blackman v. Gordon, 2 Rich. Eq. (S. C.) 43; Boisseau v. Aldridges, 5 Leigh, 222; Sutherland's Exr's v. Snyder, 84 Va. 880; 6 S. E. Rep. 480; Coffman v. Coffman, 85 Va. 459; 8 S. E. Rep. 672.

Characterizing the provisions for one of the heirs as his share or portion of the estate is not sufficient to exclude him from participation in the distribution of property not actually given. Phillips v. Phillips Adm'r, *supra*. Sutherland's Exr v. Snyder, 84 Va. 880; 6 S. E. Rep. 480. Necessary implication means so strong a probability of intention that the contrary cannot be supposed. Wright v. Hicks, 12 Ga. 155; Lynes v. Townsend, 33 N. Y. 558, 561; Sutherland's Exr's v. Snyder, 84 Va. 880; 6 S. E. Rep. 480.

Language showing testator's belief that he was disposing of all his property is not sufficient to enlarge by implication, to the exclusion of an heir, an estate expressly given to another. Sutherland's Exr v. Snyder, 84 Va. 880; 6 S. E. Rep. 480.

A paper which simply revokes all other wills and excludes a certain son from all share in the estate for reasons stated, but makes no disposition of the property nor contains any other provisions, is a nullity. Coffman v. Coffman, 85 Va. 459; 6 S. E. Rep. 672. By a will giving the wife a life estate in the homestead and two lots, and charging an annuity to her on his goods and lands but not otherwise mentioning the lands, and after sundry legacies giving the surplus to a church, the testator dies intestate as to the lands. Allen's Ex'r v. Allen, 59 U. S. (18 How.) 885. A naked power or direction to the executor to sell land for the purpose of paying legacies or making distribution does not create a devise to the executors by implication so as to cut off the heir. Clendenen v. Lanius, 3 Ind. 441; Chamberlain v. Taylor, 105 N. Y. 585; 5 Am. Prob. Rep. 510; 11 N. E. Rep. 630; Jackson v. Burr, 9 Johns. 104. Schaubert v. Jackson, 2 Wend. 18.

In case of doubtful construction, the law leans in favor of a distribution, as nearly conformed to the general rules of inheritance as possible. Lipman's Appeal, 30 Pa. St. 190.

A will containing no residuary clause, except a direction that none of testator's money was "to go back further than" his brothers and sisters' children and that one of his nephews was to have \$500 more than the rest, was interpreted as intending not a gift of the residue to the nephews and nieces, thus disinheriting a brother, but a direction for distribution according to the intestate laws. Dunlap's Appeal, 116 Pa. St. 500; 9 Atl. Rep. 936.

ESTATE OF HAMILTON MOORE *vs.* JOSEPHINE MOORE.

[88 Nebraska, 509.]

ADMINISTRATION—JURISDICTION—ABSENCE OF PERSONALTY—
 PETITION—COLLATERAL ATTACK—JURISDICTIONAL ALLEGA-
 TION:

Under section 177, c. 23, Comp. St. Neb., jurisdiction is conferred on the County Court to grant letters of administration of a decedent who was at the time of his death a resident of the county or was a non-resident of the state and left property to be administered in the county.

The jurisdiction exists, though the decedent left no property except an estate in lands which it may become necessary to sell for the payment of debts.

The allegation of a petition for letters of administration that decedent left certain property in the county cannot be questioned by objections to the allowance of a claim against the estate.

A petition for letters of administration which shows that decedent was not a resident of the county, but fails to show that he was not a resident of the state confers no jurisdiction on the county court, and letters granted on such a petition are void.

ERROR to District Court, Dawson county.

J. W. Smith and *H. M. Sinclair*, for plaintiff in error.

A. H. Connor and *J. J. Woodruff*, for defendant in error.

NORVAL, J.—The defendant in error, Josephus Moore, in January, 1888, filed his petition in the County Court of Dawson county, praying that letters of administration be granted upon the estate of his deceased father, Hamilton Moore. Subsequently, upon the hearing had for that purpose, letters of administration were granted upon said estate to one John B. Sherman, who qualified as such officer, and entered upon the discharge of the duties of his office. Afterwards, on the 12th day of July, 1888, the defendant in error presented to County Court the following claims against the estate, to-wit:

Estate of HAMILTON MOORE, deceased, in account with
JOSEPHUS MOORE.

	Dr.	Cr.
To labor from March 1st, 1873, to November 1st, 1885, with the exception of eleven months.....	\$3,525 00	
1873, 1874. To moneys laid out and expended	315 00	
February, 1887. To moneys laid out and expended.....	75 00	
June, 1884. To moneys laid out and expended	575 00	
July, 1885. To moneys laid out and expended.....	200 00	
October, 1885. To moneys laid out and expended.....	400 00	
October, 1885. For breaking done for Hamilton Moore.....	30 00	
By moneys had at various times from March, 1873, to October, 1884.....		\$300 00
By balance.....		4,820 00
	\$5,120 00	\$5,120 00

On the 16th day of August, 1888, Sylvanus Moore, one of the heirs of the estate, filed with said court written objections to the said allowance of said claim on the following grounds :

“*First.* The court had no jurisdiction to appoint an administrator, and the pretended administration of said estate is unauthorized and void.”

“*Second.* That said estate is not indebted to Josephus Moore, the claimant, in any sum whatever.”

On the hearing the County Court allowed the sum of \$2,500 on said claim. The contestant took an appeal to the District Court, where the cause was tried to a jury, and a verdict was returned for the claimant for \$2,705. Sylvanus Moore brings the case into this court for review by petition in error.

It is contended that the order of the County Court, appointing the administrator, and all subsequent proceedings thereunder, are without jurisdiction, and this for the reason that Hamilton Moore was not an inhabitant of this state at the time of his death, and left no estate in Dawson county, nor in this state, to be administered upon.

Section 177, c. 23, Comp. St., bearing upon the question presented for our consideration reads as follows: "Sec. 177. When any person shall die intestate, being an inhabitant of this state, letters of administration of this estate shall be granted by the Probate Court of the county of which he was an inhabitant or resident at the time of his death. If such deceased person at the time of his death resided in any other territory, state, or country, leaving estate to be administered in this state, administration thereof shall be granted by any Probate Court of any county in which there shall be estate to be administered; and the administration first legally granted shall extend to all the estate of the deceased in this state, and shall exclude the jurisdiction of the Probate Court of every other county."

By these provisions the legislature has conferred jurisdiction upon County Courts to grant letters of administration in two classes of cases: *First*, where the deceased person was an inhabitant of the state at the time of his death; *second*, where the deceased person was a non-resident of this state when he died, but left an estate to be administered in this state. Where the deceased was a resident of the state the County Court of the county where he resided has exclusive authority to grant letters testamentary or of administration, but in case the deceased person's last place of residence was in another state, territory, or country, the application for letters of administration may be made to the County Court of any county of this state in which there is property to be administered, and the letters first granted extended to all the property or estate of the deceased in the state, wherever the same may be. The application for the appointment of an administrator must allege the necessary jurisdictional facts, for, if a want of jurisdiction affirma-

tively appears from the face of the record, it is fatal to the proceedings, and the objection can be urged at any time. Stated differently, where there is a total failure to allege a fact upon a vital point in the petition, the County Court acquires no jurisdiction to act, but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are merely voidable. *Hyde v. Redding*, [Cal.] (16 Pac. Rep. 380); *Stizman v. Pacquette*, (13 Wis. 291); *Frederick v. Pacquette*, (19 Wis. 541); *Chase v. Ross*, (36 Wis. 267); *Wales v. Willard*, (2 Mass. 120); *Schouler, Ex'rs*, (§§ 91, 92).

The right of the plaintiff in error to question the authority of the County Court to grant letters of administration on the hearing of his objection to the allowance of the claim filed against the estate depends upon whether the record of the County Court on its face shows the lack of jurisdiction to make the appointment. It cannot be doubted that where a sufficient petition for administration is presented to the proper County Court, and the statutory notice is given, its action in appointing an administrator is valid and is binding, unless revoked or set aside on appeal. It will be presumed to have acted upon sufficient evidence. (*Hobson v. Ewan*, 92 Ill. 146; *Johnson v. Johnson's Estate*, 66 Mich. 525; 33 N. W. Rep. 413; *Lees v. Wetmore*, 58 Iowa, 170; 12 N. W. Rep. 238).

It appears from the averments in the application made to the County Court for administration that Hamilton Moore at the time of his death was not a resident of Dawson county; that he had no personal property, but was "equitably seised and possessed of real estate consisting of the south-east quarter of section 12, town 9, range 19, in said county and state." Upon the trial in the District Court the plaintiff in error introduced in evidence a deed of said real estate, executed by Hamilton Moore, a short time prior to his death, to Hannah Moore and Hattie Moore; this, for the purpose of showing that the deceased left no property in Dawson county, and for that reason the County Court acted without jurisdiction. From what we have already

said it is obvious that whether or not the deceased owned the land was quite immaterial. That question could not be raised on the hearing of an appeal from allowance of a claim against the estate. A County Court has jurisdiction to grant letters of administration, although the deceased has no personal property, where he owns an estate in lands, and owes debts for the payment of which it is necessary to sell the real estate. The legislature provided for the sale of lands of deceased persons by administrators and executors for the payment of debts when the personalty in their hands is not sufficient for that purpose.

Section 67, c. 23, Comp. St., provides that "when the personal estate of any deceased person in the hands of his executors or administrators shall be insufficient to pay all his debts, with the charges of administering his estate, such executors or administrators may sell his real estate for that purpose upon obtaining a license therefor, and proceeding therein in the manner hereinafter provided."

Section 76 provides that "the proceeds of any real estate sold for the payment of debts and charges of administration, as provided in this subdivision, shall be deemed assets in the hands of the executor or administrator, in like manner as if the same had been originally a part of the goods and chattels of the deceased," etc.

By these provisions the legislature has made lands assets for the payment of the debts of a decedent in the event of a failure of personalty, and it is perfectly clear that administration might be granted upon the basis of real estate alone, where it is made to appear that an administrator is necessary.

It is nowhere alleged in the petition for administration that Hamilton Moore was a non-resident of this state when he died, nor is any fact averred from which such inference can be drawn. The only statement in the petition as to residence is that he was a resident of Dawson county until a short time preceding his death, from which it cannot be inferred that he was an inhabitant of some other state at the date of his death. It not appearing from the petition

that the deceased was either an inhabitant of Dawson county or a non-resident of this state, the County Court had no jurisdiction to appoint an administrator, and it follows that all subsequent proceedings are void. Having reached this conclusion, the judgment of the District Court must be reversed, and the action dismissed.

Reversed and dismissed.

The other judges concur.

Jurisdiction to grant administration.—An administrator may be appointed in the county of the intestate's residence, though there be no tangible assets to administer. *Toledo, St. L. & K. C. R. Co. v. Reeves* (8 Ind. App. 667), 35 N. E. 199. And the court of any county in which a non-resident leaves property, has jurisdiction to appoint an administrator. *Ott v. Hutchinson* 91 Ga. 315; 16 S. E. Rep. 106. Though he leaves only real estate and an administrator has been appointed in the state where he resided. *Prescott v. Durfee*, 181 Mass. 477. Administration may be granted upon the basis of real property alone, and when granted, the court thereby acquires jurisdiction over the lands of the intestate in any county of the state. *Lees v. Wetmore*, 58 Iowa, 171. It is not an objection to the granting of original administration, that the only property to be affected thereby, consists of a promissory note secured by a mortgage of land, and that the land has been held adversely for more than twenty years. *Parsons v. Spaulding*, 180 Mass. 83, or that there is no property of deceased beyond an interest in an action at law. *Murphy, Neal & Co. v. Creighton*, 45 Iowa, 179. But the appointment of an administrator on the estate of a non-resident leaving no property in the county is invalid. *Jeffersonville R. Co. v. Swayne's Adm'r*, 27 Ind. 477; *Mallory Estate v. Burlington & M. R. Co.*, 53 Kan. 557. 36 Pac. Rep. 1059; *Moise v. Mutual Reserve Fund Life Ass'n*, 45 La. Ann. 736; 13 So. Rep. 170.

It is to be noticed that though the court in the *Swayne* Case says, of such an administration, that it is *coram non judice* and void, and in the *Mallory* Case that it is absolutely void, in neither of these cases was the question raised collaterally, but on a direct application for revocation. The general rule is that a grant of administration by a court having general jurisdiction of such matters, cannot be questioned collaterally, unless the record affirmatively discloses a lack of jurisdiction over the particular estate. *Chapman v. Bite*, 5 Tex. Civ. App. 506; 23 S. W. Rep. 514. Thus the appointment of an administrator is valid as against a collateral attack on the ground that the petition fails to allege the death of the intestate. *Manning v. Leighton*, 65 Vt. 84; 26 Atl. Rep. 258. Or that it fails to show compliance with statutory requirements as to examination under oath. *Farley v. McConnell*, 52 N. Y. 630; *Johnston v. Smith*, 25 Hun, 171. Or that the petition was not verified. *Appeal of Miller*, 32 Neb. 480; 49 N. W. Rep. 427. Or of the omission of the petition to state, as required by stat-

ute, the names of the heirs and the probable amount of the personal estate. *Judd v. Ross*, 146 Ill. 40; 34 N. E. Rep. 631. Or because of irregularities in the service of the citation. *Chilton v. Union Pac. R. Co.* 8 Utah, 47; 29 Pac. Rep. 963. Or that the court did not at its next term enter of record the confirmation of the letters. *Macey v. Stark*, 116 Mo. 481; 21 S. W. Rep. 108. Or on the ground that the order fails to show the intestacy of the decedent and his residence in the county. *Brien's Adm'r v. Hart*, 6 Hum (Tenn.) 131. Or that it appeared from the records of the court that when the administrator qualified as such, a blank bond was signed by him and his sureties. *Spencer v. Cahoon*, 4 Dev. Law. (N. C.) 225.

Nor can the validity of the appointment be impeached collaterally by showing that the decedent was not a resident of the country. *Bolton v. Brewster*, 32 Barb. 389; *Re Harvey*, 3 Redf. 214; *Johnson v. Gaines*, 1 Cold. (Tenn.) 288; *East Tennessee V. & G. R. Co. v. Mahoney*, 89 Tenn. 311; 15 S. W. Rep. 652; *Eller v. Richardson*, 89 Tenn. 575; 15 S. W. Rep. 650. Or by showing that he left no property in the county. *Murphy, Neal & Co. v. Creighton*, 45 Iowa, 179; *Lees v. Wetmore*, 58 Iowa, 170. Or by showing that letters had previously been issued to others and were unrevoked. *Power v. Speckman*, 126 N. Y. 354, 357; 27 N. E. Rep. 474; *More v. Finch*, 65 Hun, 404; 20 N. Y. Supp. 164. Or that the petition falsely represented the petitioner to be creditor of the intestate where neither the residence of a creditor within the jurisdiction nor the application of one is essential to the jurisdiction. *Manning v. Leighton*, 65 Vt. 84; 26 Atl. 258. Or that the letters were issued without citation to the widow or renunciation by her. *Kelly v. West*, 80 N. Y. 139. Or that the administrator was neither a relative or creditor of the intestate. *Hobson v. Ewan*, 62 Ill. 147. Or that the record fails to show that there was no widow, next of kin or creditor entitled to administration. *Schnell v. City of Chicago*, 38 Ill. 882. Or that the petition for administration by a creditor fails to state the nature and amount of his debt. *Johnson v. Johnson's Estate*, 66 Mich. 525; 33 N. W. Rep. 413. Nor can the probate of a will be attacked collaterally by showing the infancy of testatrix. *Ex parte Williams*, 1 Lea (Tenn.), 529. Or that another administrator of the same estate had been appointed by another court of the state. *Posey v. Eaton*, 9 Lea 500.

SOMMERS vs. BOYD, Treasurer

[48 Ohio St. 648.]

DEATH OF WARD—LISTING PROPERTY FOR TAXATION.

The guardian of a deceased ward on whose estate administration has been granted, is not the proper person to list the property of the estate for taxation, though his final account has not yet been settled. His authority and control over the personal estate are terminated by the death of the ward, and his possession of the property is simply as custodian.

The legal situs of the investments of an estate for the purpose of taxation is not the place where the evidences of debt happen to be, but the domicile of the administrator.

A guardian is not, by listing the property of his ward estopped from showing that such listing was unauthorized, the guardianship having been terminated by the death of the ward and administration on the estate having been granted.

ERROR to Circuit Court, Butler county.

Action by W. M. Boyd, county treasurer, against David Sommers, as guardian of John McCleary, an imbecile, to recover the amount of taxes charged against the defendant on the tax duplicate of the county for the year 1889, on the property listed by the defendant on the 11th day of April, 1889. The defendant filed an answer averring the death of McCleary on March 19, 1889, the appointment of an administrator on his estate on March 25th, 1889, the qualification of the administrator, his residence in Somers township, Preble county, Ohio, the enlistment and return of the property for taxation in the latter county and the payment of the taxes by the administrator. It also shows that the enlistment by the defendant was made under protest and when he was uncertain as to his duty in the premises, he having at the time not made his final account as guardian, nor transferred the property to the administrator, but that since that time he had made and filed his account which was finally settled and approved by the Probate Court.

Judgment was rendered for plaintiff and affirmed by the Circuit Court.

Fisher & Vaughn and *Israel Williams*, for plaintiff in error.

C. J. Smith and *Alex. F. Hume*, for defendant in error.

WILLIAMS, C. J.—The personal property of which McCleary died seised was not subject to taxation in both the counties of Butler and Preble. Some of it might properly be taxable in one county, and some in the other; but the same property could not be required to bear the double burden of taxation in both. Nor could the listing of the property by Sommers and that by Duffield both be lawful. Either the one or the other was without the requisite authority to bind the estate. The first question we are called upon to decide, therefore, is, who was the proper person to list the personal property belonging to McCleary's estate for taxation? And the decision of that question may go far towards determining, if it does not entirely do so, where the property should have been listed.

The statute declaring who shall list personal property for taxation provides that "the property of every ward shall be listed by his guardian," and the property "of every estate of a deceased person by his executor or administrator." And it also provides that "every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession," and "all moneys invested, loaned or otherwise controlled by him, as agent or attorney, or on account of any other person, company or corporation." (Rev. St. § 2724.) With regard to the time and manner of listing the property it is provided that the person required to list it shall annually "make out and deliver to the assessor a statement, verified by his oath, of all the personal property, moneys, credits, investment in bonds, stocks, joint stock companies, annuities, or otherwise in his possession or under his control on the day preceding the second Monday of April of that year, which he is required to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent,

factor or otherwise." (Id. § 2736.) The day preceding the second Monday of April in the year 1889 was the 9th day of that month. And the record shows that on the 25th day of the previous month Duffield was appointed administrator of McCleary's estate.

It is well settled that immediately upon the appointment of an administrator all the personal estate of the deceased passes to and vests in him, and his title as administrator relates back to the date of the intestate's decease. As was said by PARKER, C. J., in *Jewett v. Smith* (12 Mass. 310), "the property may be considered in abeyance until administration is granted, and is then vested in the administrator by relation from the time of the death." In *Lawrence v. Wright* (23 Pick. 128), the rule is stated by SHAW, C. J., as follows: "The personal property of a deceased person vests in the executor or administrator; and when an administrator is appointed the appointment dates back, and vests the property in him from the decease of the intestate. Those who have the property in custody in the meantime have no further power or interest in it than is necessary to enable them to keep it safely, and have it forthcoming when called for by the administrator."

We see no reason to doubt that on the 9th day of April, 1889, the title to the whole of the personal estate of McCleary was vested in Duffield, as administrator, who alone had authority to represent the estate, and upon whom, as we have seen, the statute enjoined the duty of listing it for taxation. Counsel for the defendant claim, however, that Sommers was the proper person to list it for that year. They contend that either the guardianship of Sommers continued until, on the settlement of his final account, the effects of the deceased ward should, under an order of the Probate Court, be turned over to and received by the administrator, or they were, on the 9th day of April, 1889, otherwise so in Sommers' control as to make it his duty, under section 2734 of the Revised Statutes, to list the same for that year. In our opinion, neither position is tenable. The guardianship terminated upon the death of the ward;

and thereafter the guardian was without authority to do any act which could effect or be binding upon the estate. He no longer held the property as guardian, but as a custodian merely. In *English v. Campbell* (Wright, 119), it was held that "a guardian, or a man that has been guardian, after his guardianship expired, has no more power than if he had never been appointed." And see *Perry v. Brainard* (11 Ohio, 442). The final account to be rendered after the death of the ward is not an account of an existing, but of the past guardianship; and, while such an account may be a convenient means of enabling the administrator to ascertain with accuracy the extent of the estate, it is not essential to his title to, or the exercise of his authority over it. We are unable to discover any ground upon which it can be maintained that the guardianship is extended until the settlement of the account. The possession retained by the guardian of the ward's estate after the latter's death is a mere naked possession, without authority to invest, loan or otherwise control the same; and under the decision in *Myers v. Seabrook* (45 Ohio St. 232-235; 12 N. E. Rep. 796), is not sufficient to bring him within the provision of section 2734 of the Revised Statutes, which requires every person of full age and sound mind to list for taxation "all moneys invested, loaned or otherwise controlled by him as agent or attorney, or on account of any other person or persons." In the case just cited it was held that the possession by an agent of the credits of the principal, with authority to collect and remit to the latter the interest and the principal, but without other control of the credits, did not make a case, within the statute, authorizing the agent to list them for taxation. Applying the maxim *noscitur a sociis* in the construction of the statute, the court say: "The phrase, 'or otherwise controlled by him,' must be construed to mean in a manner similar to the loaning and investing of money." Nor, according to that decision, does the fact that the money for which the credits were given had been previously loaned by the person having them in possession, when the same was listed by him, in any way alter the case.

There the securities listed by the agent were given for money which he had previously loaned for the principal, and which were left in the agent's hands for collection, and it was nevertheless held, the agent was without authority to list the securities for taxation. So that, in the case before us, the fact that the securities in the hands of Sommers were given for money of the ward which he had loaned while guardian, is without significance. In our view of the question, therefore, the administrator, and not Sommers, was the proper person to list the personal estate of McCleary for taxation in the year 1889; and the due administration of the estate involved the payment of such taxes as had been or might be charged against it.

With respect to the place where the property should be listed, the statute provides that "every person required to list property on behalf of others shall list the same in the same township, city or village in which he would be required to list it if such property were his own." (Rev. St. § 2735.) That this provision applies to administrators is evident from the language of the next clause, which is: "But he shall list it separately from his own, specifying in each case the name of the person, estate, company or corporation to whom it belongs." Duffield, the administrator, being, as we have seen, the person who was required to list the property of the McCleary estate in April, 1889, and it being his duty to list it in the same municipality or township where he should list his own property, the place of listing the property of the estate will be determined when it is ascertained where Duffield should that year have listed his own property of like kind, unless other provisions of the statute prescribe a different rule governing such cases. The other statutory provisions on the subject are contained in the same section, and are as follows: "All merchants' and manufacturers' stock, and all personal property upon farms, shall be listed in the township, city or village in which the same may be situated; and all other personal property, moneys, credits and investments, except as otherwise specifically provided, shall be listed in the township,

city or village in which the person to be charged with taxes thereon may reside at the time of the listing thereof, if such person reside within the county where the same are listed, and, if not, then in the township, city or village where the property is when listed." It is shown by the record that the property listed by Sommers as belonging to McCleary's estate consisted of credits, including mortgages, to the amount and value of \$103,000, and the remainder, amounting to \$530, was tangible property,—mostly farming utensils and agricultural products. The tangible property, it is conceded, should have been listed in Millford township, Butler county, where it was situated on the 9th day of April, 1889. The *situs* of the credits, for the purposes of taxation, is the substantial matter of the controversy. Credits, being rights in action merely, have no actual *situs*; but, as such property is made the subject of taxation, it has been given a constructive or legal *situs*, which, when not otherwise fixed by statute, is that of residence of the owner. It was said by WELCH, J., in *Worthington v. Sebastian* (25 Ohio St. 1-10), such property is "incapable of a separate *situs*, and must follow the *situs* either of the creditor or the debtor. To make it follow the residence of the latter is to tax the debtor, and not the creditor,—to tax poverty instead of wealth. That it is the creditor, and not the debtor, that is to be taxed, and that the tax is to be imposed by the law of the creditor's place of residence, and not the law of the debtor's place of residence, seems to be quite well settled by authority." This general rule is recognized in *Brown v. Noble* (42 Ohio St. 405), where it is said by McILVAINE, J., that "it is not disputed that, as a general rule, the *situs* of personal property is, in law, the residence of the owner; nor that the administrator or executor of an estate is the owner of the assets, within the meaning of this rule. But granting this, it is nevertheless true that the legislature may fix the place where personal property, including moneys, credits and investments subject to taxation in this state, must be listed." After considering the provisions of sections 2734 and 2735 of the

statutes, the conclusion derived from them is stated by the learned judge as follows: "It seems clear to us that the *situs* of moneys, credits and investments for the purposes of taxation is the residence of the person whose duty it is to list the same, and not the residence of the owner, if they be located in different counties." Under this rule, inasmuch as it was the duty of the administrator, in April, 1889, to list the credits belonging to the estate of McCleary, they were properly listed by him in the township and county of his residence, notwithstanding McCleary's residence at the time of his death, and that of the person who had been his guardian, were in another county; and the instruments which were the evidence of the credits due the estate were also in the latter county. The credits were not there in the possession of any one clothed with the authority or charged with the duty of listing them; and the mere presence there of the evidences of the indebtedness did not so fix the *situs* of the credits as to require them, under the last clause of section 2735, to be there listed for taxation.

Counsel for the treasurer further contend that Sommers is estopped from denying his liability to pay the taxes for which the action was brought. The argument is that the tax-list which he delivered to the assessor, and which was by the assessor returned to the auditor, induced the auditor to enter the property upon the tax duplicate, and charge the taxes for the current year against it, and Sommers ought not, therefore, to be permitted to dispute the statement contained in the return. It is plain an estoppel cannot be so raised. The statement purported to be a list of the personal property belonging to the estate of McCleary, in Sommers' hands as guardian. It seems that Sommers doubted his authority to list the property, and this is expressed in the statement. As we have attempted to show, he was wholly without such authority, and his action was inoperative to bind the estate; and, if so, it is not readily perceived how it could operate to bind it by way of estoppel. The property is entered upon the duplicate as the property of McCleary's estate, the taxes are charged against

Sommers as guardian, and the action is against him in his representative capacity. It is not sought to make him individually liable, and the facts alleged in the pleadings would not create an individual liability. The conduct of Sommers was not intended or calculated to mislead or deceive any one, but was founded upon an innocent mistake. The auditor simply performed his ministerial duty of carrying the property returned by the assessor upon the duplicate, and charging the taxes against it. His position was in no way changed by reason of the mistake, nor does it appear that the position of any other person was. The essential elements of an estoppel are wanting.

The judgment below will be reversed, and judgment entered for the defendant.

FORE vs. FORE'S ESTATE.

[2 North Dakota, 260.]

**ALLOWANCE TO FAMILY—WIDOW WITH CHILDREN—HOMESTEAD
—REMARRIAGE.**

Under Comp. Laws, N. D. § 5779, providing that in addition to the specific articles mentioned in the preceding section, the family of a decedent shall be allowed all such personal property or money as is exempt by law from levy and sale under execution, the family is entitled to have personal property not to exceed in value the sum of \$1,500 set apart, section 5128, exempting property of that value, to be selected by the judgment debtor.

The property so set apart to the widow of a decedent leaving no minor child becomes, under Comp. Laws, § 5784, the absolute property of the widow, and is not to be considered on the final distribution of the estate.

The final settlement and distribution of the estate is not a disposition of the homestead within the meaning of section 5778, giving the surviving husband or wife the right to continue to possess and occupy the homestead until it is otherwise disposed of by law.

The remarriage of a widow does not impair her right to continued possession and occupation of the homestead.

APPEAL from District Court, Traill County.

A. B. Levissee, for appellant.

F. W. Ames, for respondent.

BARTHOLOMEW, J.—On appeal from an order entered by the Probate Court of Traill county to the District Court, this case was submitted upon an agreed statement of facts, which we reproduce so far as necessary for a proper understanding of the points decided. Lars N. Fore died intestate in Traill county, in January, 1887, leaving surviving him a wife, but no issue, and his father, Nils L. Fore, as his only heirs at law. In due course an administrator of the estate was appointed and qualified, and proceeded to the discharge of his duties. At the time of his death Lars N. Fore was the owner of 240 acres of land, upon 160 acres of which, all lying in one body, he, with his wife, resided, using the same as a homestead. The inventory of his personal property amounted to over \$1,800. After the death of Lars N. Fore his widow continued to reside on the homestead, and in about nine months she intermarried with one Frigstadt, and still continued to reside and make her home, with her second husband, on such homestead. Under the orders of the Probate Court the administrator turned over to the widow property known as "absolute exemptions," to the value of \$153, and, in addition thereto, other personal property, for her use, of the value of \$1,496. In the final settlement the administrator was credited with said amounts, and the Probate Court refused to include the homestead in the property distributed to the heirs of Lars N. Fore in the final decree settling the estate. While the case was pending in the district court, Nils L. Fore died, and his administrator, Nils N. Fore, was substituted as a party to the action. The District Court sustained the action of the Probate Court, and the administrator of Nils L. Fore appeals the case to this court.

The appellant claims that the court erred in allowing the widow personal property to the amount of \$1,496 in addition to the absolute exemptions, and in postponing the

distribution of the land embraced in the homestead of Lars N. Fore to his heirs, until after the surviving widow ceased to occupy the same as a home. Section 5778, Comp. Laws, reads as follows: "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age; and, in addition thereto, the following personal property must be immediately delivered by the executor or administrator to such surviving wife or husband, and child or children, and is not to be deemed assets, namely: (1) All family pictures; (2) a pew or other sitting in any house of worship; (3) a lot or lots in any burial ground; (4) the family Bible, and all school-books used by the family, and all other books used as a part of the family library, not exceeding in value one hundred dollars; (5) all wearing apparel and clothing of the decedent and his family; (6) the provisions of the family, necessary for one year's supply, either provided or growing, or both, and fuel necessary for one year; (7) all household and kitchen furniture, including stoves, beds, bedsteads, and bedding, not exceeding one hundred and fifty dollars in value." Section 5779 contains the following: "In addition to the property mentioned in the preceding section, there shall also be allowed and set apart to the surviving wife or husband, or the minor child or children of the decedent, all such personal property or money as is exempt by law from levy and sale on execution or other final process from any court, to be, with the homestead, possessed and used by them." We first notice the objections to the allowance of personal property amounting to \$1,496 to the widow for her use. Section 5127, Comp. Laws, absolutely exempts from levy and sale on execution all the specific property mentioned in section 5778, above quoted, except the seventh subdivision. It also specifically exempts the homestead. The following section (5128) reads as follows: "In addition to the property mentioned in the pre-

ceding section, the debtor may, by himself or his agent, select from all other personal property, not absolutely exempt, goods, chattels, merchandise, money or other personal property, not to exceed in the aggregate fifteen hundred dollars in value, which is also exempt, and must be chosen and appraised as hereinafter provided." The argument is that the property that may be set apart for the use of the widow under section 5779 cannot be the same property mentioned in section 5128, because the property to which the widow is entitled is "all such personal property or money as is exempt by law from levy and sale on execution," while the property mentioned in section 5128, it is claimed, is not exempt by law, but by the act of the debtor in selecting the same. But this construction, as is readily apparent, destroys the statute. The legislature had already, by section 5778, set off to the widow all the specific property that the law absolutely exempts, and more; and hence if appellant's construction be correct, there was nothing whatever for section 5779 to act upon, and its presence in the statute is entirely superfluous. The wording of the statute does not require any such narrow construction. Section 5128 exempts "goods, chattels, merchandise, money or other personal property, not to exceed in the aggregate fifteen hundred dollars in value, which is also exempt, and must be chosen and appraised as hereinafter provided." The law creates a general present exemption to the amount of \$1,500. The debtor, by his selection, converts this general exemption into a specific exemption. The law requires him to make the exemption specific in that manner or waive it. The power that he has is not to create an exemption, but to waive one that the law has already created for his benefit. We do not understand the case of *Maun v. Welton*, (21 Neb. 541; 32 N. W. Rep. 599), cited by the appellant, to conflict with these views, but rather to sustain them. In that case there was exempt "the sum of five hundred dollars in personal property." The debtor was required to make a sworn inventory, and that was followed by an appraisement and selection. The debtor took no

steps to make the exemption attach to any specific property, but brought replevin against the officer. The court said that when the selection was made, "then, and not until then, does the quality of exemption attach to the specific property to the extent that replevin may be maintained for its possession." Had the husband lived, he could as against any legal process, have held all the property that was turned over to the widow for the support and maintenance of his family. We cannot think that the legislature intended to give the family less protection when the husband and father was dead than when he was living. See *Bank v. Freeman*, 1 N. D. 196; 46 N. W. Rep. 36).

It is also contended that the property so set apart to the widow is only to be "possessed and used" by her temporarily, and must be accounted for in the final distribution of the estate. Whatever may be the holding in other states, our statutes are explicit to the contrary. Section 5784, following in the same chapter with the sections specifying what shall be set apart for the use of the family, says: "When personal property is set apart for the use of the family in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband." We quote so much of the section as covers this case, and there can be no doubt of its meaning. The ruling of the court upon the disposition of the personal property was clearly right. The respondent contends that, upon the death of the husband, his widow surviving him, and he being seised in fee of the land then occupied by himself and his family as a homestead, and dying intestate, the fee to the homestead goes to his heirs at law, under the statute of descent; but that the homestead right, including the right to possession, whether the husband died testate or intestate, survives, and passes to his widow, to be enjoyed by her so long as she continues to occupy the premises as a homestead. Appellant takes issue upon the last proposition, and claims that the homestead right of the widow, including the posses-

sion and usufruct, ceases and determines at the final settlement and distribution of the estate. The decision of the issue involves a construction of that portion of the statute heretofore quoted, which reads: "Upon the death of either husband or wife the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law." This language which we are called upon to construe was taken from the statutes of Iowa, where it appears in the exact form we find it in our law. (Code Iowa, § 2007.) The context, however, was somewhat changed to conform to our different policy. In Iowa, the next following section (2008) provides that "the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is contemplated in the preceding section. But the survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased." The distributive share thus spoken of is one-third in value of all the legal or equitable estate possessed by the deceased at any time during marriage, and which has not been sold on judicial sale, and to which the survivor has relinquished no rights. (See *id.* § 2440.) And this share is not affected by will, unless the survivor consents thereto. (*Id.* § 2452.) There is nothing in our law corresponding with sections 2008, 2440, and 2452 of the Iowa Code. Under those statutes the right of the survivor to possess and occupy the homestead for life has been repeatedly declared. (*Floyd v. Mosier*, 1 Iowa, 512; *Burns v. Keas*, 21 Iowa, 257; *Size v. Size*, 24 Iowa, 580; *Meyer v. Meyer*, 23 Iowa, 359; *Butterfield v. Wicks*, 44 Iowa, 310; *Mahaffy v. Mahaffy*, 63 Iowa, 55; 18 N. W. Rep. 685.) And it has also been held that during such occupancy the heirs cannot interfere therewith nor claim partition. (*Nicholas v. Purcell*, 21 Iowa, 265; *Dodds v. Dodds*, 26 Iowa, 311.) But it has also been held that such occupancy cannot be claimed in addition to the distributive share. (*Meyer v. Meyer*, *supra*; *Butterfield v. Wicks*, *supra*; *Smith v. Zuckmeyer*, 53 Iowa, 14; 3 N. W. Rep. 782.) The survivor holds this distributive share ex-

empt from the debts of the decedent. (*Mock v. Watson*, 41 Iowa, 244; *Kendall v. Kendall*, 42 Iowa, 464; *Thomas v. Thomas*, 73 Iowa, 657; 35 N. W. Rep. 693.) The Supreme Court of Iowa, under these statutes, hold that, while the survivor is entitled to occupy the homestead for a reasonable time in which to make a selection between a life-estate in the homestead and the distributive share provided by law (*Cunningham v. Gamble*, 57 Iowa, 46; 10 N. W. Rep. 278), yet continued occupancy of the homestead will be held an election to take the homestead for life. (*Conn v. Conn*, 58 Iowa, 747; 13 N. W. Rep. 51; *Butterfield v. Wicks*, *supra*; *Holbrook v. Perry*, 66 Iowa, 286; 23 N. W. Rep. 671.) By section 2455, Code, Iowa, it is provided that, if the intestate leave no issue, one-half of his estate shall go to his family and the other half to his widow. In *Burns v. Keas*, *supra*, it was held that in such case the widow takes one-third as her distributive share and one-sixth as heir; and in *Smith v. Zuckmeyer*, *supra*, it is held that in such a case, where the survivor elects to hold the homestead for life, he thereby surrendered the one-third or distributive share only, and that, as to the fraction which he took as heir, it was not affected by his continuous possession of the homestead.

We desire now to call attention to certain further provisions of our statute. The estates of dower and curtesy are unknown to our laws (sections 2594, 3402, Comp. Laws); nor have we any estate that corresponds therewith. The husband and the wife are heirs-at-law to each other's estates, the portion which each will inherit in the estate of the other depending upon the presence or absence of certain other heirs, and may be one-third, one-half, or the whole, thereof. (Section 3401, *id.*) But the entire estate of either husband or wife may be disposed of by will, subject to the homestead rights of the survivor as declared by law. (Section 2466, *id.*) While our statute as to the rights of the surviving husband or wife seems to be largely patterned after the Iowa statute, yet it is apparent that the differences are such that the Iowa decisions are largely in-

applicable here. With us, the survivor has no "distributive share" whatever. All that goes to the survivor, aside from the personal right to possess and occupy the homestead, is taken as heir. Nor is there any provision or necessity for an election between the rights as survivor and the rights as heir. There is no intimation that both rights may not be enjoyed, and both at the same time. The only Iowa case on this point that would seem applicable to our condition is *Smith v. Zuckmeyer*, and that, so far as applicable, is authority for the ruling of the Trial Court. It is claimed, however, that a fair interpretation of this language of our statute forces the conclusion that some disposition of the homestead estate was thereby intended, aside from a voluntary disposition on the part of the survivor, and aside from possession on her part to the exclusion of the co-heir, and that such disposition would terminate her homestead right without regard to her will or wishes. More felicitous language might undoubtedly have been used to express the single thought that the survivor might continue to possess and occupy the homestead as long as she preserved its homestead character and occupied it as a home. But we think the legislature had in view also the fact that there might exist a mortgage upon the homestead property, executed by both husband and wife, or that the taxes thereon might not be paid, and the homestead become liable therefor under section 2452, Comp. Laws, or that it might be liable for a mechanic's lien under the same section, or for some portion of the purchase price thereof under the succeeding section. In either of these events it might be disposed of according to law, and the occupancy of the survivor thus terminated. But we do not think it was the intention of the legislature that the survivor should be disturbed in this occupancy, so long as the premises remained the home of the survivor, by any co-heir or devisee, and we will briefly state some of the reasons which force that conclusion. Ample provision for the establishment of the home and maintenance of the family has ever been the fixed policy in this jurisdiction. As we have seen, our exemptions of personalty are unusu-

ally liberal; and these exemptions go to the family of a decedent, and cannot be disposed of by will, or taken for debts, except where there are no other assets available for the payment of the expenses of decedent's last illness, funeral charges, and expenses of administration. (Section 5779, *id.*) The law also, prior to the passage of chapter 67, Laws 1891, allowed a homestead to the extent of 160 acres of land if in the country, and unlimited as to value. (Under the law last mentioned the homestead is fixed at a valuation of \$5,000, independent of quantity, and other changes are made in the homestead law; but as this case falls under the prior law, and as the changes do not affect the questions at issue, we need not particularly notice them further.)

The fee of the homestead may be owned by either husband or wife, but such owner has no power to convey or incumber such homestead without the concurrence of the husband or wife. (Comp. Laws, § 2451.) The homestead of Lars N. Fore was not subject to the payment of any of his debts. (*Id.* § 5781.) It is too plain for question that these various provisions were intended, not for the benefit of the husband and father, but for that of the family—and a widow, though without children, constitutes a family, within the meaning of the homestead law (*Id.* § 2450); and it would be strangely inconsistent if the benefits to which the family were entitled during the life-time of the husband and father should be taken away from them by the law immediately upon his decease—the very time when they most needed these benefits. The widow has no absolute rights in the property of her deceased husband except her right to the homestead as survivor. All other estates may be devised. If that right extends only during administration, then the law which prevents him from conveying or incumbering that homestead is of no benefit to the family. He is liable for their support while he is living, and if, by will, he can deprive them of that homestead as soon as his estate can be settled, it would seem a useless requirement to prohibit its sale during his life. Again,

“subject to the rights of the surviving husband or wife, as declared by law, the homestead may be devised like other real property of the testator.” (Id. § 2466.) In no case is a devisee entitled to come into possession of his devise until the estate is settled and distributed. If, as appellant claims, the widow’s right of possession as survivor ceases at the same time, why were the devisee’s rights made subordinate to hers? The two rights could not clash; one ceasing when the other began. On the other hand, if her right of possession as such survivor continues as long as she continues to reside and make her home upon the property, then the section would have force and be necessary. Again, “upon the death of both husband and wife, the children may continue to occupy the homestead until the youngest child becomes of age.” (Id. § 5778.) It is certain that as to the children, when both parents are dead, the right to occupy the homestead does not cease when the estate is settled. It may continue for twenty years longer. If appellant’s position be correct, we would have the following results: When a party possessed of a homestead dies, leaving surviving him a widow and children, the law will, immediately upon the settlement of his estate, deprive that family of its home, and the property will go to the devisee, or be subject to partition among the heirs-at-law, as the case may be. But if the same party die, leaving surviving him children only, the law cannot so seize upon the homestead, but the same may remain in the possession of the children until the youngest attains majority. Can any plausible reason be assigned for this distinction? None suggests itself to us. Keeping in mind the entire statute and the undoubted policy of our laws, it seems clear that the purpose of this law is that, upon the death of the husband and father, the widow should continue to possess and occupy the homestead with the children, during her entire life, if she so elect, and upon her death the children may continue so to possess and occupy the homestead until the youngest child becomes of age, so that at no time, until the youngest child reaches the period when the law

declares him able to care for himself, shall this family be without a home, or—in case the homestead be a farm—without the means of obtaining a livelihood. But this occupancy, either of the surviving widow or children, would be terminated by any disposition of the homestead according to law, as hereinbefore indicated. In view of the facts of this case we deem it proper to add that the statutes will be searched in vain for any intimation that the widow's rights as survivor are affected in any manner by the absence of issue or by the fact of a second marriage. This last point is directly ruled in *Nicholas v. Purzcell*, *supra*. To the point made by appellant that a homestead interest cannot attach to property owned in common, we reply that such is the case only where the common ownership is prior in point of time to the initiation of the homestead right. In this case the homestead right existed before descent cast. It existed in the life-time of the decedent, and he was powerless to destroy it. The subsequent ownership in common of the fee cannot affect the prior right. The judgment of the District Court is in all things affirmed.

All concur.

Allowance to Widow and Children.—The statutory provisions of the several states for allowances to the widow and children of decedent differ widely in their character and scope, and a corresponding difference in their construction and application will be found to exist. In some states this allowance is made to depend on the necessitous condition of the widow and family. In *re Dewell's Estate*, 88 Iowa, 14; 55 N. W. Rep. 11; *Succession of Tugwell*, 48 La Ann. 879; 9 So. Rep. 449; *Succession of Waddell*, 44 La Ann. 361; 10 So. Rep. 808. It is a provision for the destitute. *Succession of Waddell, supra*. Intended for the present relief of the widow for the maintenance of herself and family. *Adams v. Adams*, 51 Mass. (10 Met.) 170. For the temporary relief of the immediate necessities of the widow on her husband's death. *Washburn v. Washburn*, 27 Mass. (10 Pick) 374; *Paine v. Hollister*, 139 Mass. 144; 29 N. E. Rep. 541. The widow's claim is not a right, it rests on the discretion of the court. *Caldwell v. Estate of Caldwell*, 54 Iowa, 456; 6 N. W. Rep. 714; *Appeal of Gowen*, 32 Me. 516; *Kersey v. Bailey*, 52 Me. 198, 199. To be determined in the light of all circumstances of the particular case. In *re Peet's Estate*, 79 Iowa, 185; 44 N. W. Rep. 354; *Kersey v. Bailey, supra*; *Washburn v. Washburn, supra*; *Hollenbeck v. Pixley*, 69 Mass. (3 Gray) 521, 525. As is also the amount to be allowed in those states in which it is not fixed

by the statute. In *re* Peet's Estate, *supra*; In *re* Dewell's Estate, 88 Iowa, 14; 55 N. W. Rep. 11; *Gilman v. Gilman*, 52 Me. 184, 192. It is a question solely of the necessities of the widow. *Hollenbeck v. Pixley*, *supra*. The circumstances of the widow and the amount of her private estate may be taken into consideration. In *re* Peet's Estate, *supra*; Appeal of Walker, 88 Me. 17; 21 Atl. Rep. 176.

In other states these provisions are held to be part of the exemption laws of the state. *Talmadge's Admr. v. Talmadge*, 66 Ala. 199; *Ex parte Pearson*, 76 Ala. 521; *Barber v. Ellis*, 68 Miss. 172; 8 So. Rep. 390; *Kapp v. Public Admr.* 2 Bradf. 258; *Hettrick v. Hettrick*, 55 Pa. St. 290; *Graham v. Stull*, 92 Teun. 673; 22 S. W. Rep. 735. Or are to be construed as being *in pari materia* with such laws. *Neff's Appeal*, 21 Pa. St. 247; *Davis' Appeal*, 34 Pa. St. 256; *Huffman's Appeal*, 81 Pa. St. 329. Hence, have no application in favor of non-residents. *Auerbach v. Pritchett*, 53 Ala. 451, 458; *Talmadge's Admr. v. Talmadge*, *supra*; *Velle v. Koch*, 27 Ill. 129; *Mitchell v. Word*, 64 Ga. 208; *Barber v. Ellis*, 68 Miss. 172; 8 So. Rep. 390; *Medley v. Dunlap*, 90 N. C. 527; *Simpson v. Cureton*, 97 N. C. 112; 2 S. E. Rep. 668; *Kuhn v. Newman*, 26 Pa. St. 233; *Platt's Appeal*, 80 Pa. St. 502; *O'Niell's Estate*, 11 Pa. Co. Ct. Rep. 491; *Graham v. Stull*, *supra*. Even though the deceased was a resident. *Ex parte Pearson*, *supra*. Or of a wife who leaves her husband and renounces all conjugal intercourse a considerable time before his death. *Odiorne's Appeal*, 54 Pa. St. 175. Or of a widow who had been divorced *a mensa et thoro*. *Hettrick v. Hettrick*, *supra*. But a woman who, though deserted by her husband, continued to support their children, he making no provisions for her, is entitled to their benefit. *Terry's Appeal*, 55 Pa. St. 344.

In New York, while the general Exemption Laws make provision in favor of a "house holder" the statute relating to the estates of decedent's provides for one who has left a family, and is therefore held to apply in favor of non-residents. *Kapp v. Public Administrator*, *supra*. As also in favor of a widow who had not lived with her husband during ten years prior to his death, he not having kept house, the eldest daughter living with her mother the greater part of the time until she became of age, being boarded by her, her father paying for her clothes, but not for her board. *Shedd's Estate* 11 N. Y. Supp. 788; s. c. 60 Hun, 637; 14 N. Y. Supp. 841; *aff'd* 133 N. Y. 601; 30 N. E. Rep. 1147. The articles exempted are to remain in the possession of the widow so long as she is able and willing to keep up the family circle, and provide suitably for the minor children, and if the children leave the widow during their minority, contrary to her wishes, and without any fault or omission on her part, she is still entitled to the property until they arrive at full age, though another provides for the children. *Scofield v. Scofield*, 6 Hill, 642.

These provisions are also said to be a branch of the statute of distribution. *Farris v. Battle*, 80 Ga. 187; 7 S. E. Rep. 282. And to apply to non-residents as well as residents. *Farris v. Battle*, *supra*; *Maddox v. Patterson*, 80 Ga. 719; 6 S. E. Rep. 581. Even though husband and wife had lived separate and apart. *Farris v. Battle*, *supra*. And a minor child was held entitled to their benefit though living with her mother who had been divorced from the decedent. *Maddox v. Patterson*, *supra*. But the amount to which the widow of a non-

resident is entitled is to be regulated by the law of the domicile. *Mitchell v. Word*, 64 Ga. 208.

The right is preferred to the undertaker's claims for funeral expenses. *Weir's Estate*, 10 Pa. Co. Ct. Rep. 187. And to the creditors of the decedent. In *re Peet's Estate*, 79 Iowa, 185; 44 N. W. Rep. 356; *Re Daggett*, 2 Conn. (Surr.) 230; 9 N. Y. Supp. 652; *Comphor v. Comphor*, 25 Pa. St. 31. So much of the estate is withdrawn from the general course of administration and appropriated to the use of the widow and family even though the widow takes under the will. *Comphor v. Comphor*, 25 Pa. St. 31. These allowances have been classified among the expenses of administration and as such are superior to the husband's right to dispose of the property. *Miller v. Stepper*, 32 Mich. 194.

The right of a widow is a privilege to retain, not a transfer of any part of the estate. *Adams v. Adams*, 51 Mass. (10 Met.); *Machemer's Estate*, 140 Pa. St. 544; 21 Atl. Rep. 441. It does not vest on the death of the husband, but only when the widow has elected to exercise it. *Kern's Appeal*, 120 Pa. St. 523; 14 Atl. Rep. 435; *Machemer's Estate*, *supra*. Which must be done promptly or she will be deemed to have waived it. *Kern's Appeal*, *supra*. And is lost on her remarriage before exercising it. *Kern's Appeal*, *supra*; *Machemer's Estate*, *supra*. And at her death does not survive or devolve on her personal representative. *Simpson v. Cureton*, 97 N. C. 112; 2 S. E. Rep. 668. Though an allotment has been made, and an appeal is pending from the decree. *Adams v. Adams*, *supra*. Or the widow has recovered a judgment for it against the administrator but has not reduced it to judgment. *Succession of Tugwell*, 43 La. Ann. 879; 9 So. Rep. 499. But a contrary rule prevails in some states, and on the death of the widow, the right devolves on her representatives. *Leslie v. Tucker*, 57 Ala. 483; *Brown v. Joiner*, 77 Ga. 232; 3 S. E. Rep. 157.

J. W. CULP *et al.* vs. D. P. LEE, Executor of Thomas Russell.

[109 North Carolina, 675.]

DEVISE TO CHILDREN—PER CAPITA—POST NATUS CHILD—COM-PROMISE BY GUARDIAN—REMEDIES—LIMITATIONS.

Under a direction that the surplus shall be equally divided and paid over to certain persons "and the children of my niece" "in equal portion, share and share alike, to them and each and every one of them," the children of the niece take *per capita*, and not *per stirpes* as a class.

A child of the niece born after the death of the testator is entitled to share with the others.

The settlement by a guardian with the executor of an estate for a less sum than the ward is entitled to receive is not a bar to a suit for the difference by the ward against the executor. He is not limited to his remedy against the guardian.

Such an action is, however, barred by the statute of limitations when an action by the guardian would be barred.

APPEAL from Superior Court, Mecklenburg County.

E. T. Cansler and *J. A. Bell* (by brief), and *C. W. Tillett*, for plaintiff.

No counsel *contra*.

CLARK, J.—1. The direction in the residuary clause that the “surplus shall be equally divided and paid over to Phillip J. Russell, Miss Mary Russell and the children of my niece Martha, wife of Charles Stanford, in equal portion, share and share alike, to them, and each and every of them, their executors, administrators and assigns, absolutely, forever,” was properly construed as a devise *per capita*, and not to the children of Martha Stanford *per stirpes*, as a class. The authorities, *Bryant v. Scott* (21 N. C. 155); *Cheeves v. Bell* (54 N. C. 234); *Harrell v. Davenport* (58 N. C. 4); *Hill v. Spruill* (39 N. C. 244); *Waller v. Forsythe* (62 N. C. 353); *Harris v. Philpot* (40 N. C. 329); *Lane v. Lane* (60 N. C. 630); *Ward v. Stowe* (17 N. C. 509), and other cases cited by counsel,—are in point. There is nothing in the will which takes this case out of the settled rule of construction. The intention of the testator expressed that the surplus should be “equally divided” between the beneficiaries, Philip Russell, Mary Russell and the children of Martha Stanford, and that they shall take “in equal portion, share and share alike, to them and each and every of them,” points clearly to a *per capita* division among them.

2. The child of Martha Stanford, born the day after the testator’s death, is entitled to share with the other children. (*Barringer v. Cowan*, 55 N. C. 436.)

3. If the guardian received for his wards a less sum than they were entitled to receive, it is true that they can sue the

guardian and his sureties for his default, but they have their election to sue either the guardian or the executor from whom he insufficiently collected the fund devised to them, or both. (*Harris v. Harrison*, 78 N. C. 202; *Luton v. Wilcox*, 83 N. C. 21.) It has been held that where a receiver, appointed to take charge of a ward's estate, makes a settlement with the guardian, and executes a release to him, even under the direction of the court, such settlement and release are not conclusive against the ward. (*Temple v. Williams*, 91 N. C. 82.) The settlement made in this case by the defendant with the guardian of the plaintiffs had no other effect than to put the burden on plaintiffs to prove that the settlement made by defendant with their guardian was not a full payment of the sum due them, and which the guardian should have collected in their behalf.

4. When the defendant filed his final account, 19th December, 1876, it closed the trust, as between him and the distributees, if *sui juris*, so that the lapse of ten years certainly would bar an action against him. (Code, § 158; *Wyrick v. Wyrick*, 106 N. C. 86; 10 S. E. Rep. 916.) If not, indeed, six years. (Code, § 154, [2;] *Vaughan v. Hines*, 87 N. C. 445; *Andres v. Powell*, 97 N. C. 155; 2 S. E. Rep. 235; *Kennedy v. Cromwell*, 108 N. C. 1; 13 S. E. Rep. 135.) If the plaintiffs had been without a guardian to represent them, the statute would not have run against them till one had been appointed or the disability of nonage had been removed. (*Brawley v. Brawley*, 14 S. E. Rep. 73, at this term.) But here the guardian was appointed in November, 1873, and the defendant has been exposed to an action by him since the account was filed, in December, 1876, more than ten years, and the principle applies that a cause of action barred against a trustee is barred against *cestui que trust* also. (*Wellborn v. Finley*, 52 N. C. 228; *Herndon v. Pratt*, 59 N. C. 327; *Clayton v. Cagle*, 97 N. C. 300; 1 S. E. Rep. 523; *King v. Rhew*, 108 N. C. 696; 13 S. E. Rep. 174.) If the trustee, the guardian, was faithless or negligent, he was liable on his bond to an action by his wards after their arrival at age. If, at that time, the defendant had not be-

come protected by the lapse of ten years from filing his final account, the plaintiffs could have brought action against him as well as the guardian, as we have said above. (*Harris v. Harrison*, 78 N. C. 202.) Error.

As to the rule that under a bequest or devise to one person and the children of another person the donees take *per capita* and not *per stirpes*, see *Burnet v. Burnet*, 30 N. J. Eq. 595; 1 Am. Prob. Rep. 539 and note 544; In re *Swinburne*, 16 R. I. 208; 7 Am. Prob. Rep. 355.

GEORGE W. REID vs. JANE M. WALBACH AND OTHERS.

[75 Maryland, 205.]

CONTINGENT INTEREST—RESIDUARY DEVISE—TRUSTS — HERE-
INBEFORE GIVEN.

Under a devise in trust for a daughter during her life, and after her death in trust for her child or children then living, and in the event of the death of any child before its mother the issue of such child to take the share of its parent, the children have no vested interest during the life of the mother. The interest in the estate contingent on the death of all the children of the daughter in her lifetime and without issue passes by a residuary clause directing the division of "all the rest and residue of the property over which I have any control, including money, rents, dividends and other moneys."

Under a clause directing "that the property hereinbefore given" to a certain daughter be held in trust for her during life and on her death, for her children, the trust does not attach to the property or interest given to that daughter by the residuary clause, but she takes the same absolutely.

Nor does such trust character or life tenure attach to certain personal property given to the same daughter by a previous clause, but which, by a codicil giving all property loaned to her, to her and another daughter, is stated to have been loaned.

A direction in a will for the distribution among the children of a certain person of the property "hereinbefore given" to her, does not control the disposition of the share given to her by the residuary clause.

APPEAL from Circuit Court of Baltimore city.

James D. Cotter, for appellant.

Gans & Haman and Thos. A. Whelan, for appellees.

IRVING, J.—In the execution of a power of appointment in the will of her husband Mrs. Eliza Whelan made a will, and died in 1867. The will contains thirty clauses, and there are four codicils. The provisions of this will and these codicils give rise to the question presented in this case.

By this will and three codicils certain property was given to Jane M. Walbach, a daughter of the testator, and a married woman, and to her sole and separate use; and Francis W. Elder and Thomas Whelan were appointed trustees, to hold and manage the property of Mrs. Walbach. After the proceedings in equity in the Circuit Court in Baltimore city, two parcels of the real estate devised in trust for Mrs. Walbach were decreed to be sold for better investment, and sales were made. But in the proceedings for the sale of one of those parcels certain persons now supposed to have been necessary parties defendant were not made parties, and the case now under review was instituted for the purpose of getting the sales made ratified by the court after bringing all necessary parties before the court, and to get the court to assume jurisdiction of the trust, and to appoint a trustee in place of Thomas Whelan, deceased, and F. W. Elder, resigned, and to construe certain clauses of the will, and to direct the new trustee who shall be appointed in the place of Thomas Whelan, deceased, and Francis W. Elder, trustee, who resigned and was released, as to the distribution of the funds.

The clauses of the will requiring consideration are the 10th, the 21st, the 24th, the 25th, and 28th; and the 1st, 2d, and 4th codicils.

The tenth clause reads thus: "I give and devise to my daughter Jane Margaret Walbach the dwelling-house and

lot (my present residence) on the west side of Charles street in said city;" and the twenty-fourth clause is as follows: "It is my will that the property hereinbefore given my daughter Jane Margaret Walbach shall be held by, and the same is hereby given to, my friend Francis W. Elder, in trust for the sole and separate use of my daughter for and during her natural life, so that the same, and all the rents and profits thereof as they may accrue, may be taken and enjoyed by her as a *feme sole*, and free from the control of her present or future husband, and without being in any manner liable for his debts; and from and after her death, in trust for her child or children then living, to be equally divided between them, if more than one, and in the event of the death of a child, living my said daughter, the issue thereof, if any, to succeed to the part of its parent."

By the third codicil of the will Thomas Whelan, Jr., was appointed co-trustee with Francis W. Elder to execute the trust.

By the second codicil, and the first clause thereof, the testator says: "I give and devise a lot of ground on Federal hill to my daughter, Jane Margaret Walbach, and her children, to be held and enjoyed by her and them in like manner as the real estate given to her and them by my last will is directed and appointed to be held and enjoyed."

In the fourth codicil Eliza Whelan, the testatrix, devises as follows: "Whereas, in and by my last will I have given and devised to my son Thomas Whelan, Jr., the warehouse and lot lying on the north side of Baltimore street in the city of Baltimore, then occupied by Messrs. F. R. Waesche & Co., and others, and also the three feet alley in the rear of said lot, and leading thence to Charles street. Now, I do hereby revoke the said devise, and in lieu thereof do hereby give and devise the said warehouse and lot and said alley unto the said Thomas Whelan, Jr., and to my daughter Jane Margaret Walbach, and their heirs, as tenants in the following proportions, that is to say: To my son two parts in three, and to my said daughter one part in three, to be divided; and I give the parts so intended for my said

daughter unto my said son and to my friend Francis W. Elder in trust for my said daughter and her children and descendants, in manner and form precisely as she and they are to have and enjoy the property which I have given to her or them, or in trust for her or them, by my said last will and the codicil thereto heretofore made by me." Clause 28 of the will is a residuary clause, in the following language: "All the rest and residue of my property and of the property over which I have any control, including ready money, rents, dividends, and other moneys due me at the time of my death, after payment of my debts, funeral expenses, and expenses of administration, shall be divided, as follows: To my daughter Cornelia, one-half part thereof; to my daughter Mary one-fourth part thereof; and to my daughter Jane Margaret one-fourth part thereof; and, in the event of an insufficiency of said funds to pay said debts and expenses, the same is to be made up out of the property given to my said son, Thomas."

The Charles-Street property and the Federal-Hill property have been sold under decree of the court in separate proceedings; but the Baltimore-Street property has not been sold.

The first question for consideration is, was there any contingent interest in the property given in trust for Jane Margaret Walbach left undisposed of? The court below decided there was, and in that conclusion we fully concur. The property is given in trust for Jane Margaret Walbach during her life, and after her death in trust for her child or children then living, and, in the event of the death of any child during the life of the mother, the issue of such child to take the part of the parent. It is plain that there is no provision made for the contingency of all the children dying in the life-time of the mother, leaving no issue. Should that condition of things occur, it is evident that the fee-simple in these three pieces of real estate is undisposed of by the testatrix, unless the contingent interest passes under the residuary clause of the will. By the language used there can be no vested interest in the children until the

death of the mother, for it is to vest only in such children as may be living when the mother dies. The vesting being contingent upon the mother's death, and dependent on who may survive her for the estate to vest in, the interest is a contingent interest only. (*Demill v. Reid*, 71 Md. 192; 17 Atl. Rep. 1014; *Lamour v. Rich*, 71 Md. 369; 18 Atl. Rep. 702; *Bailey v. Love*, 67 Md. 592; 11 Atl. Rep. 280; *Straus v. Rost*, 67 Md. 465; 10 Atl. Rep. 74; *Mercantile Trust & Deposit Co. v. Brown*, 71 Md. 170; 17 Atl. Rep. 937; *Engel v. State use of Giger*, 65 Md. 544; 5 Atl. Rep. 249.) Mrs. Walbach is an old woman, having but one child, a daughter thirty-eight years old, and unmarried; and if she was to die before her mother, and without issue, the life-estate of the mother would be the only effective disposition as to these pieces of property. This contingent fee-simple interest the Circuit Court decided passed by the residuary clause, and in this view we also agree. Contingent estates of inheritance will pass by descent, and are also devisable. (*Spence v. Robins*, 6 Gill. & J. 513; *Hambelton v. Darrington*, 36 Md. 444.)

This is a case where, the testatrix having failed to dispose of a certain contingent and possible interest in the estate by special gift, we are asked to decide whether she is to be regarded as having died intestate thereof, or shall be regarded as having disposed of the same by the residuary clause of the will. In *Booth v. Booth* (4 Ves. 407), Lord ALVEENLY says: "Every intendment is to be made against holding a man to die intestate who sits down to dispose of the residuary of his property;" and this view is adopted by this court in *Dulany v. Middleton* (72 Md. 76; 19 Atl. Rep. 146). In *Barnum v. Barnum* (42 Md. 312), this court expressly decided that undisposed-of property will pass under a residuary clause of a will, no matter how it happens that any part of the property is not disposed of by the special provisions of the will. It may be that the testator may not know that he or she is leaving anything unprovided for. Even if the testator does not know that the property undisposed of actually belongs to him, it will pass by a resid-

uary clause sufficiently comprehensive in language to embrace it. (*Vide Barnum v. Barnum, supra.*) It has been suggested that the language of the residuary clause in this will is not comprehensive enough, but contains language which so narrows its effects and operation as to exclude this contingent estate. The language relied on for this contention is as follows: "All the rest and residue of my property, and of the property over which I have any control, including ready money, rents, dividends, and other moneys due me at the time of my death," etc. The particular kind of property which is intended to be covered by this provision, it is suggested, is here indicated as being moneys or funds. The word "including" is sought to be given the meaning of "consisting of," and thus to designate what and what only was to pass by that clause. We do not think this is a fair, natural, or reasonable construction of the language used. It begins with the language, "all the rest of my property, and the property over which I have any control," and then follows the language about the moneys. She evidently intends disposing of all the balance of her own property, and all the balance of that which she had the control over, by appointing the takers thereof. The words which are added were added by way of indicating that money was to be regarded as property within her meaning, and excluding the possible idea and conclusion that it was not intended to be included. Undue anxiety that all should be included has given rise to a contention that would not have arisen but for the effort to be more explicit than was necessary. The use of the word "including" shows that the testatrix meant to put in something besides what was designated by the first words used. In charging the payment of debts and funeral expenses from what was put into this residuary clause, and, if any deficiency, putting its payment on Thomas Whelan from what was given him, it is urged that this contingent estate cannot be supposed to have been intended as included. It is very possible that the testatrix did not know she had made such an omission in disposing of the real

estate already mentioned, as to leave the fee in certain contingencies unprovided for; but that does not make any difference. (*Dalrymple v. Gamble*, 68 Md. 528; 13. Atl. Rep. 156; *Stannard v. Barnum*, 51 Md. 451; *Hambleton v. Darrington*, 36 Md. 446.) The intention not to die intestate of anything is clearly manifested in the disposition she makes of even small articles mentioned in the will.

Another question has arisen under this residuary clause, and that is, how, and in what proportion, the distribution under it is to be made. The appellant contends that under that clause Jane M. Walbach takes an interest, and that her interest is only for life; and it is further contended that George W. Reid takes three-fourths of his mother's (Mary Reid's) share, and that the heirs of Thomas Reid take one-fourth thereof. As a daughter of the testatrix and named as one of the legatees, Jane M. Walbach takes a share of the residue; and the question is, does that interest go in trust for life only? There were four children, and Jane M. Walbach's share is named as one-fourth of this residue. As that undisposed of interest cannot arise till after Mrs. Walbach's death, it would be a contradiction to say her share thereof is for life only, when such interest cannot in fact exist; and, unless the language was so express that such construction was unavoidable, it ought not to be adopted. But there is no difficulty about it. The clause creating the trust confirms the trust to the property hereinbefore given Mrs. Walbach. It does not attach to any property or interest given in a subsequent clause of the will. Whatever passed to her by the residuary clause of the will clearly passed to her absolutely, and unfettered by the trust.

The twenty-fifth clause of the will, which directs the method of distribution between the children of Mary Reid, if both of them survive her, (for there were but two,) confines the direction of distribution to the property hereinbefore given to the mother, and cannot by any fair construction be made to apply to and include property therein-after given.

By the word "hereinbefore" that only is intended and included which had already been given, and that which is afterwards given cannot be held as controlled by the direction in the twenty-fifth clause of the will. Argument cannot make that plainer.

Cornelia Whelan, under the residuary clause, takes one-half of the residue. By her will, after certain pecuniary bequests, she gives all the residue property to her brother, Thomas Whelan, there can be no doubt that he succeeds to her interest under the residuary clause of the will.

The appellant contends that the interest in the furniture, set of china, and pew in the cathedral pass to Mrs. Walbach for life only, and are controlled by the trust. We see no ground for this contention, and think the Circuit Court was right in decreeing Mrs. Walbach's interest in those things or their proceeds was absolute and freed from the trust. The argument is that, as the furniture was given by the twenty-first clause of the will it is included in the property described in the twenty-fourth clause as "property hereinbefore given," to which the trust by that clause is made to attach. However plausible that contention might be if there were no other provisions afterwards made, the subsequent provisions in the codicils relieves the matter from doubt.

By the first codicil, reciting the disposition in the will of the furniture, she speaks of it as being intended for her daughter Jane and her sister Mary, without any qualification whatever. Then, after stating that she had loaned this furniture to her daughter Jane, she says: "Now I do hereby will and direct that all the articles which I have so loaned to my said daughter Jane, or which I may hereafter loan to her, shall, on my death, go to and I hereby give and bequeath the same to my said daughters Jane and Mary." By this last expression of her will and wishes she gives the furniture loaned to Jane to her and her sister absolutely. She could not have intended a part to be in trust and a part to be an absolute gift. This codicil reflects light on what was originally intended, and shows that the trust was

only intended to apply to the real estate. It is very like the case of *Wood v. Conly* (62 Md. 546), where the court held that certain furniture named in the will was not subject to a limitation over, but that the limitation only applied to the real estate. The china is given without qualification by the second codicil, and the interest in the pew in the cathedral is similarly given in the third codicil. These gifts are absolute, and subject to no trust. It is worthy of note that whenever by codicil anything is given to Jane M. Walbach, in which it was the wish of the testatrix that she should take only a life-estate, and be subject to a trust, the qualification of the gift is expressly made. Having expressed the wish as to part, that about which no such wish is expressed is excluded. *Expressio unius exclusio alterius*.

The decree appealed from ratified the sale of the Charles-Street property and the Federal-Hill property, and the investments made of the proceeds. No objection has been made in this court to the action of the court below in this regard. In the case of the sale of the Federal-Hill property all persons having any interest, vested or contingent, were made parties to the proceeding, and no reason has been assigned why that sale was not advantageous and proper. As to the sale of the Charles-Street property, it was shown to be advantageous to the parties, and it was admitted to be to the interest of all that it should be confirmed. The purchaser supposed when he bought that he bought all the interests of all the parties. Those who were not original parties, having been brought in, offer no objection to the ratification of the sale, and action of the court as to that sale will also be approved. Decree affirmed.

ANNA MARIA SCHMIDT et al. vs. EMIL SCHMIDT et al.

[47 Minnesota, 451.]

PROBATE — RIGHT TO JURY — UNDUE INFLUENCE — MENTAL CAPACITY.

An appeal to the District Court from an order of the Probate Court admitting or refusing to admit a will to probate is not a case at law within the meaning of Const. Minn. Art. 1, § 4, guaranteeing the right of trial by jury. Undue influence to avoid a will must so destroy the free agency of the testator at the time it is made, that it expresses the will and intention of some one else and not his own.

Mere mental and physical weakness caused by age and sickness do not of themselves amount to mental incapacity. A person able to understand and carry in his mind in a general way, the nature and situation of his property and his relations to those who would naturally have some claim on his remembrance, possesses a sound and disposing mind.

Laws Minn. 1885, c. 193, permitting an adverse party to be called and examined as if under cross-examination has not changed the order of trial or the rules of cross-examination so as to permit a party to introduce a part of his own case on cross-examination of his adversary's witnesses.

APPEAL from District Court, Dakota county.

Henry C. James, for appellants.

Stringer & Seymour and *Hodgson & Schaller*, for respondents.

MITCHELL, J. — The principal question in the case is whether, upon an appeal to the District Court from an order of the Probate Court admitting or refusing to admit a will to probate, a party has a constitutional right to a trial by jury of the issues as to the validity of the proposed will. The validity of the will which the Probate Court admitted to probate in this case was contested on the grounds (1) that it was never properly executed; (2) that the testator was not, at the time of its execution, of sound and disposing mind; (3) that its execution was procured by the undue influence of certain of the beneficiaries. When the matter came on for trial the appellants moved that

these issues should be submitted to a jury, which the court refused.

If the statutes of the state are invalid, there can be no doubt that the appellants had no absolute right to a jury trial. From the earliest days of the territory down to date the statute has always been that a party is entitled to a jury trial, as a matter of absolute right, only of an issue of fact in an action for the recovery of money only, or of specific real property, or for divorce on the ground of adultery; but that every other issue of fact must be tried by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue or any specific question of fact be tried by a jury. (St. 1851, c. 71, §§ 6, 7; Gen. St. 1866, c. 66, §§ 198, 199; Gen. St. 1878, c. 66, §§ 216, 217.) Prior to 1874 the statute regulating appeals from the Probate Court made no special or express provision as to the mode of trial. This left the matter to be controlled by the general provisions of statute already referred to. The Laws of 1874, c. 71, § 2 (Gen. St. 1878, c. 49, § 19), expressly provided that no jury trials should be allowed in such cases, except as provided by section 199, c. 66, Gen. St. 1866 (Gen. St. 1878, c. 66, § 217), and upon issues settled in accordance with the rules of court. This fact made no change, such being already the law. This same provision, in substance, unless appeals from the allowance or disallowance of a claim against the estate be an exception, is re-enacted in the Probate Code of 1889, § 261. (Laws 1889, c. 46.)

Section 4, art. 1, of the State Constitution, ordains that the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy. The doctrine of this court from *Whallon v. Bancroft* (4 Minn. 70; 109 Gil. 70), down to *State v. Thresher Manuf'g Co.* (40 Minn. 213, 41 N. W. Rep. 1020), has uniformly been that the effect of this constitutional provision is merely to continue unimpaired and inviolate the right of trial by jury as it existed in the territory at the time of the adoption of the Constitution; that

it neither added to nor took from that right, except that, for reasons explained in *Whallon v. Bancroft*, *supra*, it was extended to all "cases at law," without regard to the amount in controversy. It would not be claimed that proceedings to probate a will is a "case at law," as that term is generally understood or construed by this court. It therefore follows that a trial by jury in such proceedings was not given by the territorial statutes in force at the time of the adoption of the State Constitution, and consequently is not within the constitutional guaranty, if those statutes are controlling.

Counsel for appellants, however, seeks to avoid this result by the following line of argument, to-wit: That the right of trial by jury in the territory was determined by article 7 of the amendments to the Constitution of the United States, as the paramount law, that "in suits at common-law, when the value in controversy shall exceed \$20, the right of trial by jury shall be preserved;" that this had been construed by Justice STORY in *Parsons v. Bedford* (3 Pet. 433), to embrace all suits, not of equity or admiralty jurisdiction, whatever may be the form which they may assume, to settle legal rights; that the issues as to the validity of a will involve legal rights, and therefore are within the guaranty of the Federal Constitution, and consequently the right of trial by jury was continued by the constitution of the state. While this mode of reasoning is ingenious, we think it is hardly sound. The immediate question being, not what construction the Federal Courts might have put on the Federal Constitution had the question arisen before them during the existence of the territory, but the construction to be placed on our own constitution, we should rather look to the provisions of our own statutes at the time of its adoption (and which were presumably supposed to have been the law at that time) in order to determine what the people of the territory understood and intended in adopting the provision that the right of trial by jury, as it then existed, should remain inviolate. If counsel's reasoning is

sound, then certainly many of the decisions of this court are erroneous, for there are numerous proceedings to determine legal rights, neither of equity nor admiralty jurisdiction, which we have held did not come within the constitutional guaranty. But, as was said in *Commissioners of Mille Lacs Co. v. Morrison* (22 Minn. 178), if this language in the *dictum* of Justice STORY was used in the sense ascribed to it by counsel, it is certainly too broad. We have found no case in which the Supreme Court of the United States has decided that article 7 is to be construed as having any such comprehensive meaning. On the contrary, many decisions may be found which assume or imply that the phrase "suits at common-law" is used in the ordinary and much more limited sense, viz., what were called "common-law actions." See Miller, Const. U. S. 492.

Counsel has exhaustively cited and discussed the authorities to show that at common law the rule was that, whenever in an equity suit the issue was *devisavit vel non*, the heir was entitled to have it heard by a jury, and that the equity court always either ordered the issue to be sent to the common-law court to be tried by a jury, or else suspended proceedings in the cause in order to enable the parties to bring an action of ejectment. As suggested by respondents' counsel, the question is not, what was the rule at common law? but what was the rule in this territory at the time of the adoption of the constitution? But an examination of the origin and history of the rule to which counsel refers will show that it grew out of a condition of things which no longer exists; and hence that it furnishes little support to counsel's contention. While formerly, in England, the ecclesiastical courts had exclusive jurisdiction of the probate of wills of personal property, they had no jurisdiction of devises of land. Until within the last thirty-five years there was no provision whatever in that country for probating wills devising land, but in any trial at common law or in equity involving the title the original will had to be produced and proved, as any

other disputed instrument. If the action was one of ejectment in a court of common law, of course it was triable by jury. While a court of equity would not, in an adversary suit, entertain jurisdiction to determine the validity of a will, yet they necessarily had to pass upon the validity of wills in cases where the question came up collaterally in cases falling under some well-recognized head of equity jurisdiction; as, for example, trusts.

As is well understood, it was the practice of equity courts, in cases where legal rights were involved, and where there was great difficulty in deciding upon the facts on account of the conflict of evidence, to direct an issue to be sent out to be tried by a jury in a court of common law. They would not direct such an issue, however conflicting the evidence, if the court was able to come to a conclusion satisfactory to its own mind. Neither would an issue be ordered on a mere suggestion on the record, unsupported by evidence in opposition to evidence on the other side. But in all cases, with two exceptions, the matter of ordering an issue to be tried by a jury was entirely in the sound discretion of the chancellor. The two exceptions were that of the heir-at-law, who was disinherited by the will of the freehold estate of which his ancestor died seised, and that of the right of a rector to the tithes of his parish. So high were these rights anciently regarded that a court of equity would never, against the objection of the heir or rector, take upon itself to pass upon them without having the verdict of a jury. In the case of a will devising real estate the court would always first obtain the verdict of a jury upon the issue of *devisavit vel non*, and then govern its own judgment accordingly. This idea of the peculiar sacredness of the right of the heir to the land of his ancestor grew out of the political institutions and the system of land tenure which then obtained. This rule was so universal, and of such long continuance, that in this country, where the different states generally established a system of probate courts with jurisdiction over the probate of wills of real estate as well as of personal property, they were so

far influenced by the precedents of the past that they sometimes provided that the probate of a will devising real estate should be only *prima facie* evidence of its validity, in which case, of course, the whole question was still open to contest by the heir in an action of ejectment. In some instances, we believe, it was expressly provided by statute that, where the question of the validity of a will affecting real estate arose in the probate proceedings, the probate court should order the issue to be tried by a jury in a common-law court. The causes which gave rise to this distinction between wills of real and of personal property having to a great degree ceased to exist, the general tendency of modern legislation has been to do away with it, and, as in this state, to make the probate of a will conclusive in all cases, and to make the trial of issues in contests over the validity of all wills conform to the mode of trial of court cases. This our statutes, territorial and state, from the earliest date, have assumed to do; and we do not think there is or was any constitutional obstacle in the way of so doing. If, as counsel for appellants claims, we are bound by the old common-law rule, it would lead to the result that, when the will affects real property, a party is entitled to a jury trial, but not if it affects only personalty—a distinction which is out of harmony with the general policy of our laws, to say nothing of the very apparent practical difficulties that would arise in attempting to apply it.

It must be admitted that it has been the usual practice in this state to submit the issue of will or no will to a jury. This is perhaps to be accounted for in part by the characteristic conservative tendency of the bench and bar to adhere to old precedents, even after they have ceased to be obligatory. It is also true that, in theory at least, such an issue is one eminently fitted to be submitted to a jury, although in practice it must be admitted that the result is not always satisfactory, for the question with the jury in such cases is very apt to be, not whether the instrument is the will of the testator, but whether it is such a will as they think he ought to have made.

Our conclusion being that the appellants had no absolute or constitutional right to a trial by a jury, we are not called upon to determine whether the exercise of the discretion of a court in ordering or refusing to order an issue in a "court case" to be submitted to a jury is open to exception, or is the subject of review on appeal, for appellants made no showing except the mere demand that the issues be submitted to a jury. Moreover, the evidence shows that no other verdict could have been arrived at by a jury, or, if arrived at, sustained, except in accordance with the findings of the court.

There is nothing in the remaining assignments of error, except the last, of sufficient importance to require special notice. They are all, in our judgment, clearly without merit. The evidence referred to in assignments 10 to 19, inclusive, was properly excluded, as not being proper cross-examination. If the evidence was competent as bearing upon the mental and physical condition of the testator, the appellants should have introduced it as a part of their own case, when they might have examined the witness as if under cross-examination, as authorized by Laws 1885, c. 193. But this statute was never intended to change the order of trial or the rules of cross-examination so as to permit a party to inject a part of his own case into the cross-examination of his opponent's witnesses.

The only remaining question is whether the evidence justified the findings of fact. Of this there can be no possible doubt. The evidence of the due execution of the will was plenary. Undue influence, such as will invalidate a will, must be something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator. It may be exercised through threats, fraud, importunity, or by the silent, resistless power which the strong often exercise over the weak and infirm; but, however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time it was made, so that the instrument in fact expresses the mind and intent of

some one else, and not his own. (*Nelson's Will*, 39 Minn. 204, 39 N. W. Rep. 143; *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. Rep. 885. It is elementary law that mere mental and physical weakness, caused by age or sickness, does not amount to mental incapacity, provided the party is capable of fairly and reasonably understanding the matter in hand. The test as to what constitutes a sound and disposing mind is that the testator shall understand the nature of the act and its effect; that is, shall understand the extent of the property of which he is disposing, and be able to comprehend and appreciate the claims of others upon his bounty to which he ought to give effect. Soundness of mind, such as will enable a person to make a will, has relation to the business to be transacted, viz., the disposition of his property. He must be able to understand and carry in his mind in a general way the nature and situation of his property, and his relations to those who would naturally have some claim to his remembrance. (*Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Whitney v. Twombly*, 136 Mass. 145; *Hammond v. Dike*, 42 Minn. 273; 44 N. W. Rep. 61.) Measured by such tests as these, the evidence was such as not only to justify, but to absolutely require, the findings which the trial court made. Had he found otherwise, it would, in our opinion, have been error.

Order affirmed.

F. O. WORLEY vs. MARY E. TAYLOR *et al.*

[21 Oregon, 589.]

IMPLIED POWER OF SALE—CHILDREN OMITTED FROM WILL.

A devise of real property, "after payment of all just debts," does not create an implied power in the executor to sell the land for the payment of debts.

Hills Code or section 3075, providing that a testator shall be deemed to die intestate as to any child not named or provided for in the will, the will is

entirely inoperative as to such child, and his title to land of which the parent died seized cannot be divested by a power of sale for the payment of debts.

APPEAL from Circuit Court, Douglas county.

Suit in equity to quiet title by F. O. Worley against Mary E. Taylor, Charles Taylor, Ella Gibson, formerly Ella Bland, widow of John Bland, deceased, Olive Robinson, Mary S. Jones and Edward Bland, Henry Bland, Dora Bland and H. M. Bland, minor heirs of Henry Bland, deceased. Decree for defendants. Plaintiff appeals.

J. D. Fullerton, G. W. Colvig and E. B. Preble, for appellant.

Lane & Lane and W. R. Willis, for respondents.

LORD, J.—This is a suit in equity brought by the plaintiff against H. M. Bland, defendant, and others, to quiet title to certain land described in the complaint. In substance, the facts alleged are these: That on the 26th day of November, 1879, the plaintiff purchased the land in question from one Lewis Chapman, and has been in possession of the same ever since. On the 21st day of July, 1879, the said L. Chapman purchased the same from Mary E. Bland, now Mary E. Taylor, who was the widow of Henry Bland, for the consideration of \$3,500. The other defendants, except Charles Taylor, are the children and heirs-at-law of said Henry Bland, deceased, who, on the 6th day of August, 1873, was the owner of said premises, and made his will, whereby he devised and bequeathed all his real and personal property as follows: To Mary E. Bland all his real property after payment of all his just debts, and to each of his six children therein named the sum of \$25. Mary E. Bland was nominated executrix of said will. Henry Bland died on the 25th day of September, 1874, but after the making and execution of said will, and before the death of said testator, a son, Henry M. Bland, one of the defendants herein, was born. The said will was duly admitted to pro-

bate, and that thereafter, on the 12th day of April, 1875, the said Mary E. Taylor, then Mary E. Bland, was duly appointed, and afterwards duly qualified, as executrix. On the 3d day of May, 1875, said executrix filed in the County Court an inventory and appraisement of all the property belonging to the said estate, and that on the 31st day of March, 1880, the said executrix filed in said court her final account in settlement of said estate, from which final account it appeared that the sum of all the debts presented to and allowed and paid by her as such executrix against said estate, together with the expenses of the administration hereof, equalled the sum derived by said executrix from the sale of all real and personal property belonging to said estate. On the 6th day of July, 1880, the said court, by order duly made, accepted the said final account, and confirmed the same in all things, and by said order released said executrix and her bondsmen from all further liabilities in said matter. The said real property sold and conveyed by the defendant Mary E. Taylor to the said Lewis Chapman, as aforesaid, was worth no more than the sum paid therefor by the said Chapman to the said defendant. It was sold for the sole purpose of settling the debts as aforesaid, and was applied by her, as such executrix, in the payment of said debts, and that all the property belonging to said estate was sold, and the proceeds applied to the payment of the just debts of said testator, and that none of the heirs named in said will ever received anything by virtue of the provisions thereof. The defendant Henry M. Bland claims some interest in the said real property adverse to said plaintiff, for the reason that said defendant was not named in the will of his father, the said Henry Bland, deceased, the nature and extent of which is unknown. The other defendants claim adversely to plaintiff, etc.; and that said claim of defendants is without right; and prays that the plaintiff be decreed to have a good and valid title, and that the defendants be debarred from asserting any claim adverse to the plaintiff.

The answer of the defendant Henry M. Bland, by his

guardian *ad litem*, is to the effect that he denies that the plaintiff is the owner of the real property in question, or any part thereof, more than an undivided six-sevenths thereof; denies that his claim is without any right whatever, etc.; but alleges that he is the owner in fee, as heir-at-law of Henry Bland, deceased, of an undivided one-seventh interest of, in, and to the premises described in the complaint; and prays that he may be adjudged and decreed to be the owner of the same.

The reply put in issue all the material facts alleged in the answer. The case was argued and submitted to the trial court upon the pleadings, and the judgment rendered therein was to the effect that the plaintiff and the defendant Henry M. Bland, minor, are owners in fee-simple as tenants in common of the described premises; the plaintiff, F. O. Worley, of the undivided six-sevenths thereof, and the defendant Henry M. Bland of the undivided one-seventh thereof.

By the terms of the will, when the testator devised the land in dispute to his wife, then Mary E. Bland, now the defendant Mary E. Taylor, "after the payment of all his just debts," according to the prevailing doctrine of English equity jurisprudence, he created a charge by implication, though not specific, upon the land devised. (2 Story, Eq. Jur. § 1246; 3 Pom. Eq. Jur. § 1247, and notes.)

The contention for the plaintiff is that when lands are so charged in the will of the testator for the payment of debts, a power to sell the lands will be implied to the executor and devisee; and therefore that the executrix and devisee of the present will had the implied power to sell the land in controversy for the payment of debts as alleged. But this doctrine of an implied power of sale has had doubts cast upon it by the case of *Doe v. Hughes* (6 Exch. 223), in which it was held that there are no implied powers in executors to sell lands arising from a mere charge of the debts upon the lands by the will.

At common law the lands of a deceased person were not liable for his debts, nor was the decedent for his specialty

obligations, except when the heir was bound. "But equity," as RUFFIN, J., said, "ever anxious to have just debts paid, strove to apply the real estate to their satisfaction, since otherwise they would remain unpaid. This was effected by holding the devisee to be a trustee for creditors, if the testator gave any intimation that such was his wish. The slightest expression was sufficient,—as, 'if he talks about his debts in the beginning of his will,'—for it is considered that he meant to go beyond the law in making a provision; else why not leave it to the law by being silent. *Williams v. Chitty*, 3 Ves. 545." (*Dunn v. Keeling*, 2 Dev. 285.)

It was for this reason—to effect the just purpose of paying the debts of the deceased—that equity gave to such general expressions in a will such construction and meaning. But the necessity for such construction in many jurisdictions does not now exist. The necessity as well as the reason for it has been superseded by statutes which make the lands of the decedent liable for the payment of all his debts. Under the provisions of our Code, the real estate of every deceased person is chargeable with the payment of his just debts, funeral charges and the expenses of administration, except that the personal estate is primarily chargeable with them, unless the deceased by his will has otherwise directed. (Hill's Code, § 1142 *et seq.*; *Wright v. Edwards*, 10 Or. 298.) Under these provisions it makes no difference whether the decedent made a will or not, or what provisions it contains. The real estate is liable whenever it is required for the payment of debts, but when the estate is more than sufficient to pay all debts it is competent for the deceased to enumerate the personality, and make his real estate primarily liable to the extent authorized by the provisions cited.

In *Smith v. Soper* (32 Hun, 47), the court says: "There is a broad distinction between a general clause in a will for the payment of debts and one for the payment of a specified legacy or debt, with respect to the application of the statutes. The clause in question in this will simply pro-

vides for what the law required if there had been no such clause, to wit, that the debts should be a charge upon the property of the testator."

In *Cornish v. Wilson* (6 Gill. 299), it was held that, since the act of 1785, the insertion of the words, "and after my debts and funeral charges are paid," in a will are immaterial and inoperative; that the act renders the real estate in aid of the insufficient personalty equally liable for the payment of debts, whether the words be contained in the will or not, or whether the deceased died testate or intestate; and that they are now of almost unmeaning form, and rarely of any import.

In *re Will of Fox* (52 N. Y. 537), ANDREWS, J., said for the court: "The statute in this state has provided an ample remedy for creditors for the collection of their debts out of the real property of a decedent, and the implication of a power of sale in executors from a simple charge of the debts upon the land is unnecessary, and ought not to be indulged."

In these cases, and others which might be cited, the words in a will, "after the payment of my debts," are considered not to have any import or effect beyond the statutory charge, and are only co-extensive with it. While the doctrine of charging lands by implication from such general expressions has been adopted in some jurisdictions in this country, it has not been without some modification. Many of them will not hold that the intent to charge the estate is implied from such general expressions, but only when the intent to create the charge is clear and certain. Mr. Perry says: "In the United States, both real and personal property are liable for the debts of a deceased person; and no valid trust can be created by will for the payment of debts, in either personal or real estate, to the injury of the right of creditors. The statutes of the several states point out how estates shall be administered for the payment of debts. Creditors, in all cases, have the right to demand payment according to the provisions of the statute. Thus trusts, charges or other directions in wills for the payment

of debts have no legal operation, so far as creditors are concerned." (2 Perry, Trusts, § 559.)

In the case at bar there is no direction in the will that the land should be sold, or any express powers conferred upon the executrix to sell it; nor is there any intent to create a specific charge upon the land, or other than a general charge by implication, from the words, "after the payment of my just debts," which, as we have seen, in many jurisdictions, will not be indulged; and in such case, and in view of our statutes and the authorities, it seems to us to be the better doctrine to hold that there is no implied powers to executors to sell lands, arising from a mere charge of debts upon them made by the will. "The mere charging lands with specific debts," says Mr. Croswell, "does not give the executor this power of sale, but the lands descend to the heir or devisee subject to the charge, and the executor has no power to sell the land to enforce the charge." (Ex'rs, § 331.)

As a consequence of these views, no such power can be implied to sustain the sale of the land in controversy, as against the minor defendant Henry M. Bland.

But even if this point were doubtful, or however this may be, there is another objection to the contention for the plaintiff which is fatal to his claim. This is as to the legal rights of the defendant Henry M. Bland to his share of the real property devised, as affected by the statute. He was not named or provided for in the will. Nor was there any provision in the will for the sale of the land by the executrix. The sale by her to Chapman was private, and not under the provisions of the statute. The inquiry, then, is, could the sale of the lands in controversy by the executrix convey the interest therein of the minor Henry M. Bland, who was born after the making of the will, and before the death of the testator, and who was not named or provided for in it? Section 3075, Hill's Code, provides as follows: "If any person make his last will and die, leaving a child or children, or the descendants of such child or children, in case of their death, not named or provided for in such will,

although born after making of such will or the death of the testator, every such testator, or so far as shall regard such child or children, or their descendants not provided for, shall be deemed to die intestate; and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all other heirs, devisees and legatees shall refund their proportional part." This section has received a construction by this court which is decisive of the rights of the minor defendant not named or provided for in the will. In *Northrop v. Marquam* (16 Or. 186; 18 Pac. Rep. 449), Hettie Northrop was born after the making of her father's will. She was not named or provided for in the will, and her father died about eight months before her birth. STRAHAN, J., said: "As to Hettie's interest in her father's estate, he is deemed to have died intestate. While the will is valid and effectual as to all the children named or provided for therein, it is no will as to those not named or provided for, and any such child will take under the law of descent in all respects as if no will had been made. Hettie, therefore, though *in ventre sa mere* at the time of her father's death, took by inheritance one-fourth of all the real estate of which he died seised in this state." And in reply to the claim that Hettie's interest was divested by the sale by the executor, and that she was compelled to accept her proportion of its proceeds upon the doctrine of equitable conversion, as applicable to the interest of a child not named or provided for in the will, he said: "By the terms of the statute there is no will as to such child; it is a case of intestacy; and to hold that the estate which comes to him by inheritance in such case would be in any manner affected by the will would be in effect, to disregard the plain provisions of the statute."

In construing a statute of similar import in *Smith v. Robertson* (24 Hun, 213), wherein Carrie B. Scott, a child, was unprovided for by any settlement, and neither provided for nor in any way mentioned in the will of her

father, the court says: "She stands, therefore, under the protection of this statute, which intended to provide for all persons similarly situated. Under it she must succeed to the same portion of the father's real estate as would have descended to her if he had died intestate. This is strong, emphatic language, and must receive satisfaction, which can only be given to it in full by allowing her to recover the land."

Upon appeal (*Smith v. Robertson*, 89 N. Y. 558), RAPALLO, J., in delivering the unanimous judgment of the court in affirmance, said: "We are of the opinion that on the death of John J. Scott, the testator, the real estate in controversy descended to his infant daughter, under the provision of 2 Rev. St. p. 65, § 49, in the same manner as it would have descended if the father had died intestate, and the infant does not take under the will, or subject to any of its provisions. The statute, instead of declaring the entire will revoked by the subsequent birth of issue for whom no provision was made, renders it inoperative as to that portion of the testator's estate which, if he had died intestate, would have descended or been distributed to after-born children. * * * The remedy given by statute against devisees, to recover a portion of the property where only a portion descends to an after-born child, does not operate to subject the estate of such child to a power of sale contained in the will, or to confine his remedies to a pursuit of the proceeds of the sale. He is entitled, by the plain terms of the statute, to recover the same portion of the *corpus* of the estate which he would have been entitled to had his father died intestate."

Nothing, it would seem, could be added to make more plain the true spirit and meaning of the statute. The child not named or provided for in the will takes by virtue of the statute, and against and notwithstanding the will. As to its interest in the realty, the father has died intestate, and the title instantly descends to such child as heir. When Henry Bland, the testator, died, the statute operated so as to vest his title in his child Henry M. Bland to its propor-

tionate share of his realty, and the instant of his demise such child became absolutely seised of its proportion of the real property in controversy. He took by inheritance that proportion of the realty to which he was entitled, unaffected by the will, whether it contained any power of sale, expressly or by implication. As a consequence, he could not be divested of his title by the alleged sale. But whether or not under such sale, where the money paid by the purchaser was applied to the payment of debts against the estate, such purchaser is entitled to be subrogated to the rights of the original holders of such claims to be charged as a lien upon the land, so as to affect the interest therein of the defendant Henry M. Bland, we do not deem it necessary for us to consider, because it is not within the purview of the pleadings.

From these views it results that there was no error, and that the decree must be affirmed.

In addition to the authorities cited in the opinion, see, also, *Smith v. Olmstead*, 88 Cal. 582; 22 Pac. Rep. 521. As to the rights of children and other descendants omitted from the will of the ancestor, see *Thomas v. Black*, and note, *infra*.

In the Matter of the Petition of ANNA M. TIENKEN for an Accounting, etc.

In the Matter of the Final Judicial Settlement of the Accounts of ANNA TIENKEN *et al.*, as Executors, etc.

[181 New York, 391.]

TRUSTS — ESTATE OF TRUSTEES — REMAINDERS — VESTED OR CONTINGENT — EQUITABLE CONVERSION.

A devise to executors in trust during the life of testator's wife to pay her a specified sum each year, and after paying all taxes, necessary repairs, etc., to "Apply the balance or remainder (of the income) once a year between"

my children, "share and share alike," vests in the executors an estate for the life of the widow only, the legal estate taken by a testamentary trustee being simply commensurate with the equitable estate bestowed.

The quality of the estate vested in the trustees is not in any manner enlarged or changed by a power to sell specified parcels of land, and to retain one-third of the net proceeds for the benefit of the wife, the remaining two-thirds to be divided among the children.

A provision that if any of the children be dead leaving issue, the issue of the children deceased should take the same share which the parent would have received if living, is, in the absence of any other construction making the clause effective and found to be within the testamentary intention, to be construed as referring to the death in the lifetime of the testator, though the statute (N. Y. R. S. 66, § 52,) renders such a provision unnecessary.

Though the will contained no direct gift of the remainder other than that implied by the power given to the executors to sell after the death of the widow and "divide the proceeds equally among my children," the facts that throughout it contains provisions for "my children," that the residuary personal estate is given absolutely one-third to the widow and two-thirds to "my children," the provision for the substitution of the heirs of any child dying and the direction to deduct from the share of one of the sons, and if he be dead, from the share of his issue, an advance made him, in case it should not have been repaid at the time a division is made of the property, and the fact that it speaks of devises to the children though it contained none except that in the residuary clause, all point to the intention of the testator to vest the whole of his estate at his death in his children and the issue of those who might then be dead, but postponing the possession and enjoyment of the real estate during the lifetime of the widow.

The fiction of equitable conversion is not employed where the same right devolves on the same persons whether the property be treated as land or money, and where no rights of third persons are affected.

APPEAL from Supreme Court, General Term, Second Department.

George F. Martens, for appellant.

Theo. N. Melvin, for respondent.

FINCH, J.—The fundamental question upon which the construction of this will turns is whether an estate in remainder vested in the children of the testator at his death, or in such of them as should survive the death of the widow and consequent termination of the trust. The general scheme of the will contemplated two essential results,—a

provision for the widow during her life, through the operation of a trust securing income for her support; and, subject to that, a gift of all the property to the testator's children; but the details of that general plan have been formulated in the terms of the will with such a degree of ambiguity and uncertainty as to have evoked a difference of opinion in the courts below, and to justify a careful consideration of the question presented.

The trust for the benefit of the wife was created by the fourth clause of the will. By the third clause the testator had given his homestead in Flatbush to his wife for life, together with the furniture and household appurtenances, absolutely and forever. His will then gives, devises, and bequeaths to his executors all the rest, residue, and remainder of his real estate, in trust during the life of his wife for certain stated uses and purposes. These were to pay to his wife \$2,000 each year, in quarterly payments of \$500, and out of the income remaining to pay all taxes, water-rates, and assessments, and all necessary repairs, and, in the final words of the clause, "apply the balance or remainder, once a year, between my children, share and share alike, for their use, benefit, and maintenance." The controversy between these parties begins with this clause. The appellants contend that it vested the whole and entire estate, except the life-estate of the widow in the homestead, in the executors as trustees; that there was no estate in remainder created by the will, or which could descend without it; and that there were and could be no ultimate rights in the children, except by and through the trust. So far as this clause is concerned, considered by itself and without reference to the latter provisions which are claimed to explain or qualify it, there would seem to be no ground for enlarging the legal estate of the trustees, beyond one, for the life of the widow. It is devised with that precise and definite limitation in the term of its creation, and no purpose of the trust, as thus far indicated, requires in the trustees a legal estate beyond or superior to one for the life of the widow alone. The rule is settled in this state that the

trustee takes a legal estate commensurate with the equitable estate, and that outside of that there may be remainders and future estates or powers of sale adequate to terminate the trust. (*Cooke v. County of Kings*, 97 N. Y. 421.) In the present case, under and by force of the fourth clause, the equitable estate bounded by the life of the wife dictated a legal estate in the executors having the same limitation, and the terms of the devise, as expressed in the will, correspond with the necessary legal result. There was therefore outside of the trust a remainder in fee which went somewhere, and which either descended to the heirs-at-law upon the death of the testator, or was devised by the further terms and provisions of the will; and we cannot, under the fourth clause, at least, get rid of the inquiry upon the appellants' theory that the entire legal estate vested in the executors, and no remainder existed. It is further to be observed that in this clause the phrase "my children" plainly refers to the testator's four living children, who were then in his mind, and who were to share equally in the balance of income when his will should take effect.

The fifth and six clauses, which follow, serves to modify the trust in the discretion of the trustees as it respects two specific parcels of real estate. The executors were intrusted with a power of sale, which they were at liberty to exercise during the life of the widow, and before the original period fixed for the termination of the trust. But upon such sale one-third of the net proceeds realized was to remain as a trust fund in the hands of the executors for the benefit of the wife, and the remaining two-thirds were to be divided, as the words are, "equally among my children, share and share alike." This power of sale in no manner enlarged or changed the quality of the estate vested in the trustees by the fourth clause. It was a power in trust, which in and of itself, and although perhaps connected with a right to receive the rents and profits, did not vest title in the trustees. (*Cooke v. Platt*, 98 N. Y. 35; *Chamberlain v. Taylor*, 105 N. Y. 192; 11 N. E. Rep. 625.) Of course, it could add nothing to the scope and extent of the legal

title vested in the executors for the life of the wife. Two things about this discretionary power, however, are worthy of consideration. It is again "my children" to whom the testator refers as distributees, and the expression does not mean, and cannot mean, such of them only as should be living at the death of his wife, for the precise purpose of the authority conferred was a possible distribution earlier than that event. The second thing demanding our attention, and to rest in our memory, is that, outside of the trust provision for the widow, the balance of proceeds of the sales goes at once and absolutely to the use and benefit of the children.

The eighth clause of the will has been quite prominent in the controversy, and two very different interpretations have been given to it, either of which its language will possibly bear. It reads thus: "Whereas, in this will is mentioned and described gifts, devises and bequests to my children, if any of them should be dead leaving issue surviving them, I do direct that the issue of any of my children deceased shall take the same share their parent would have received had such parent remained living, and to be divided among them, the said issue, share and share alike." I think its true meaning and office was to put in the place and stead of a child who should die before the testator, but leave issue surviving, such surviving issue as recipients of the parent's share, stand collectively in his or her place, as one of the children to whom the property is given. The general rule is that the death referred to, in the absence of any other named period, is one in the testator's life-time, (*Vanderzee v. Slingerland*, 103 N. Y. 53; 8 N. E. Rep. 247), and while the provision made was probably needless, in view of the protection offered by the statute (2 Rev. St. p. 66, § 52; *In re Wells*, 113 N. Y. 400; 21 N. E. Rep. 137), the fact will not alter the construction, unless some other, making the clause necessary and effective, should be found to be both a possible one and within the testamentary intention. I am inclined to think, therefore, that the eighth clause of the will, instead of dictating our conclusion, must itself receive

interpretation from our final view of the testator's intention. It is, however, an argument of some force that the clause itself was needless, except upon a construction which postponed the vesting until the death of the widow. Granting its force in that respect, we shall see, I think, that it is more than balanced by other inferences founded upon the language of the same clause, and to which I shall later recur.

We come, now, to the tenth clause, which is the one mainly relied on by the appellants, and which reads thus: "After the death of my wife, I empower and direct the surviving executors to sell all of my real estate remaining unsold, at public or private sale, in fee-simple absolute, by deed under seal, at the best possible price, and divide the proceeds equally among my children, share and share alike." The argument founded upon this provision is that there was an equitable conversion of the land into money at the date of the widow's death, and a gift over at that date of personal property merely; the legacy given was not to come into existence until the prescribed event; and that the rule applicable is that, where there is no gift except in the direction to divide a future period, time enters into the substance of the gift, and the vesting, rather than the enjoyment, is postponed.

It is certain that there was no equitable conversion out and out, and operating from the death of the testator, and none can be implied at an earlier date than the death of the widow, for none was directed prior to that event. The land, therefore, remained real estate at the death of the testator, unconverted in fact or in equity, so that the remainder in fee descended or passed by the will, and must be accounted for. We have already seen that it did not go to the executors, whose legal estate was solely for the life of the widow, and was not at all enlarged by powers of sale which themselves conferred no title; and it seems imperative to say that the remainder passed by descent or devise to the four children who survived the testator, and were identical as heirs or devisees. In either case, it passed

subject to the trust and the powers of sale, and the appellants' position must necessarily be that the legal title to one-fourth of the estate which vested in the son Henry M. was defeasible and contingent, and subject to be defeated by his death in the life-time of the widow without issue, through the exercise of the power of sale imperatively commanded, and the inevitable division of the proceeds among the children surviving the widow. The question thus becomes simply whether the power of sale and distribution of proceeds was a postponement of the time of enjoyment of an estate already vested, and merely a plan or mode of division of such estate among those fully entitled, or a scheme to invest the estate of one or more dying without issue before the widow in favor of those who should survive that event. And thus, while disagreeing with the appellants as to the scope of the legal estate vested in the trustees, and pursuing a somewhat different route, we are confronted with the same substantial question, which has been the pivotal point of the argument, in the form of an inquiry whether Henry M. took an absolute remainder in fee, or one contingent upon his survival of the widow, and which, by his earlier death, was defeated, so that nothing beneficial could pass to his widow by his will.

One other provision of the will, and one contained in a later codicil, should first be brought into view as bearing upon a correct conclusion. By the eleventh clause of the will, the whole residue and remainder of the testator's personal estate was given, one-third to the widow, and two-thirds to the four children, absolutely, at his death, vesting in them at that date; the designation used being still the one uniform and familiar phrase, "my children."

The material portion of the codicil reads thus: "Whereas, I have advanced to my son John H. Tienken, for business purposes, since the making of my aforesaid last will and testament, the sum of fifteen thousand dollars, which he promises and agrees to refund, with interest at five per centum per annum, now, in the event that he fails to pay the same, I order and direct that the amount of said sum,

with interest thereon, which is not paid at the time of my death, or at the time a division is made of my property as my will directs, shall be deducted from his share and benefit in my property as in my said will mentioned, and if he be dead, to be deducted from the share his issue would receive, and the sum so deducted to be divided between my wife and children in manner as in said will mentioned, but excluding my son John or his issue from sharing in the sum so deducted."

Now, taking this will as a whole, in all its parts, and in view of its clear and obvious purposes, we deem it impossible to resist the conviction, which even impressed itself partially upon the surrogate and controlled the conclusion of the general term, that the testator's intention and design, which he supposed himself to have accomplished, was to vest the whole of his estate in the four children living at his death, with a substitution of their issue for those who should then be dead, but postponing the possession and enjoyment of the real estate during the life of his wife so far, and so far only, as to secure for her the necessary annual income for her support. Whenever and wherever, consistently with the trust for her benefit, it was possible to give to the children an immediate possession, without deferring it in the least degree, that possession is given at once and absolutely. In the fourth clause the entire balance of income, after the annuity to the wife and the current expenses of the real estate, is given to the children absolutely and without contingency or delay. Under the discretionary powers of sale, one-third is invested to produce a trust income for the widow, but the remaining two-thirds escape from the trust, and go to the children. Two-thirds of the whole residue of the personal estate is given to them immediately, and without postponement, because that provision in no manner harms or affects the trust for the wife, and when that trust ends, everything, in equal proportion, is to be divided among the children.

In the eighth clause the testator declares that there are in his will "devises" to his children. There are none upon

the appellants' construction — only legacies, and those deferred. The word is used early in the will, before the final dispositions, but when those were in his mind, and evidently contemplated. The word was not used negligently or carelessly, for the phrasing of the will indicates legal intelligence and fitness in technical expression, and we are therefore bound to infer that, in the thought of the testator, there was a devise to his children which could only have been of the real estate subject to the trust.

It is significant, also, that the distribution in the tenth clause is in terms, "among my children," share and share alike. It is not "among my surviving children," "among those who shall then be living," or "among those and the issue of such as shall have previously died," but among "my children," — an expression already many times previously used, and invariably in one definite sense, as meaning the four children living at his death, or represented by their issue, if earlier deceased. The provision, too, is one merely for division, and intended, not so much to create a right as to sever an existing one. It is quite difficult to conceive that the testator used the words "my children" in an ambulatory, changing, or ambiguous manner; that in his thought it meant or might mean four of them at his death, three of them upon a sale under the fifth clause, two of them at a sale under the sixth clause, and one or none at the end of the trust, if such deaths should occur along the line; and that without any specific words of survival, or any appropriate provision for the emergencies. It is more reasonable to say that the phrase used in one sense at the beginning and at the end of the will was used in the same sense in the clause of distribution.

In the eighth clause and in the codicil the testator refers to the share of a child, the share such child would have had if death had not intervened, and as belonging to or devolving upon the son or daughter at the moment when the will should take effect. The manner of its use indicates that it referred to a child's share in the whole estate, rather in some undefined part of it; and when direction is

given that John's debt, if not paid at testator's death, shall stand deducted from his share, unless paid before the final distribution, and giving the wife a part of the deduction, there is contemplated as existing in John a share in the whole estate — his share — while the wife is living, and before the ultimate distribution. If the testator had meant merely John's share in the personal estate, he would have said so, since that might have been, and possibly was, insufficient to cover the debt.

In this connection, recurring, as was promised, to the phrasing of the eighth clause, it is worthy of notice that, upon either of the suggested constructions, it contemplates a share in the whole estate belonging to a child at the death of the testator, and vesting in him at that date. Upon the construction which we have adopted of a death in the testator's life-time, it substitutes for the share which a child would have had at that date the same share vesting in his or her issue, and omits any provision for issue upon the parent's later death, because such issue would take it by inheritance, at least. Upon the appellants' construction, that the death referred to means a death before or after that of the testator, and at any time preceding the death of the widow, it necessarily contemplates a share existing in each child at every moment of the prescribed period, and so as well at the death of the testator as at any succeeding day prior to the decease of the widow.

In the respects discussed, the will very much resembles that upon which we passed in *Goebel v. Wolf* (113 N. Y. 405; 21 N. E. Rep. 388.) There, as here, there was no direct gift of the residue to the children living at testator's death; there, as here, there was a trust for the support of the widow, followed by a direction to divide among the children; there, as here, the uniform words of designation were "my children," without words of survivorship or terms indicating selection among them; there, as here, there was a gift of personalty outright, and advances made chargeable as against the share of a child. We held in

that case that the estate, subject to the trust, vested in the children at the death of the testator, drawing that conclusion from the collective provisions of the will. I think the inference is quite as strong in the present case. The provisions of the will indicate a purpose to follow the legal rules of descent and distribution, modified only by the trust for the support of the widow. Of the proceeds of the discretionary sales, one-third is held for the widow, and two-thirds go to the children; the personalty is given in the same proportions; the trust-estate is in lieu of dower; and at its close the proceeds go to the children.

The clause of sale and distribution must therefore be regarded as a direction and authority given for the convenience of division, and solely for that purpose. Having no other, it may become unnecessary, and the devisees hold and retain the land in its real and actual character. The fiction of an equitable conversion is adopted only where it is a needed element to determine ownership. Equity will not resort to the fiction, where the same right devolves upon the same persons, whether the property be treated as money or land, and where no rights of third persons depend upon the conversion. When we have determined from a view of the whole will that the four children of the testator living at his death took vested interests in the property, subject only to the prior life-estates of the widow and the executors, and subject, also, to the exercise of the powers of sale, we have rendered the question of an equitable conversion quite immaterial. If the gift was a bequest, it vested in the children living at the testator's death, because the fund given was certain to be created, resting upon no doubtful contingency, dependent upon no possible discretion, and sure to exist and devolve in enjoyment at the appointed time.

We have heretofore said that the rule of construction founded upon a gift flowing only from a direction to divide has many exceptions, and is to be used as an aid to ascertain the intention, and not as a force to pervert it. I have observed, in general, that where it has prevailed it has been

where no contrary intention was fairly indicated, and where its own force was somewhat strengthened, and its indication corroborated, by further facts. We feel quite satisfied, in the present case, that the trust postponed only the period of enjoyment, and the sale was intended to conveniently sever the interests of those already entitled. The judgment of the General Term should be affirmed, with costs.

All concur.

JOHN DE LOSS ROBERTS *vs.* HUMPHREY ROBERTS, JR., *et al.*

[140 Illinois, 345.]

AFTER ACQUIRED REALTY.

Under a bequest to a wife of the use and income of all the residue of the real estate of which testator should die possessed, or in any manner interested, for life or so long as she should remain his widow, the widow takes an estate for life or widowhood in after-acquired real estate of which the testator died seized, though by a subsequent clause of the will all property not specifically devised or bequeathed is given to the wife and children, share and share alike.

APPEAL from Circuit Court, DeKalb County.

Harvey A. Jones and *Chas. A. Bishop*, for appellant.

Carnes & Dunton, for appellees.

WILKEN, J.—It is shown by this record that Humphrey Roberts, Sr., died testate in De Kalb county, this state, in June, 1887, leaving a widow and four children. On the 24th day of July, 1882, he executed a last will and testament, which upon his death was duly probated in the County Court of said county. This will contains fifteen clauses. The first directs the payment of debts; the second, the erection of a monument. The third is a bequest

to his wife of household furniture and certain real estate in the village of Waterman. The fourth and fifth give his sons William and John De Loss each small tracts of land. The sixth gives his daughter, Grace Lamb, a legacy of \$3,500 in money. The seventh devises to his son Humphrey, Jr., a small tract of land. The eighth is in the following language:

"Eighth. I give, bequeath, and devise unto my wife, Catharine Roberts, the use, benefit, and income of all the rest and residue of the real estate, wherever the same may be situate, of which I die possessed, or in any manner interested in, for and during her natural life, or so long as she shall remain my widow; and in case of her marriage, instead of the above bequeaths and devises to her, it is my will, and I hereby bequeath and devise to her, in lieu of the same, such interest in my estate as she is entitled to under the laws of the state, were I to die intestate."

The ninth, tenth, eleventh and twelfth devise to each of his said four children certain described tracts of land upon the death or marriage of his said wife. The thirteenth is a bequest to a grandson. The fourteenth is in the following language:

"Fourteenth. I give and bequeath unto my wife, Catharine Roberts, and my said children, William W. Roberts, John De Loss Roberts, Humphrey Roberts, Jr., and Grace Lamb, to be taken by them share and share alike, all the rest and residue of my property which has not been specifically bequeathed and devised, of whatever nature the same may be, whether real, personal, or mixed."

The fifteenth appoints executors. John De Loss, one of the sons, filed this bill against the widow and his said brothers and sister, praying for the partition of 160 acres of land of which his father, Humphrey, Sr., died seised, but which was not mentioned in his will; it in fact being after-acquired property. The defendants answered jointly.

The only question raised by the bill and answer is, has the widow, Catharine Roberts, under said will, an estate

for life or widowhood in the land described in the bill? The Circuit Court held in her favor on this question, and decreed accordingly. We concur in that conclusion. The will of Humphrey Roberts, Sr., admits of no other construction. There is no ambiguity in the language of its eighth clause. It gives the widow for life, if she remains unmarried, an estate in all the lands of which the testator should die possessed, except such as had been devised in fee by preceding clauses, in the most positive, unequivocal and comprehensive language; and it being alleged in the bill that said Humphrey Roberts, Sr., died seised of the land in question, this clause gives his widow the estate for life or widowhood in it as certainly as though the testator had owned it when he made his will, and devised it to her by specific description.

Appellant bases his contention to the contrary on the fourteenth clause, insisting that by its language this land is devised to himself, brothers and sister, and said widow, as tenants in common, in equal parts or shares, in fee, unincumbered by any life-interest in said widow. If this construction can be maintained, it must be done by holding that said eighth and fourteenth clauses are so far repugnant to each other that the latter is evidence of a change in the mind of the testator as expressed in the former, because, as we have seen, there is no uncertainty in the language of the former.

It is perhaps impossible to find a case which can be said to be absolutely decisive of another, involving the construction of a will; but upon principle this case cannot be fairly distinguished from *Rountree v. Talbot et al.* (89 Ill. 246.) There the first clause gave the widow a life-estate in all the testator's real estate; but the second clause gave a daughter certain lots in fee, who contended that she took them unincumbered by a life-estate in the widow. We there said: "The intention of this will is most clear that the testator's wife should have a life-estate. * * * It cannot be supposed that the very next devise, in the following clause, of lots 40 and 42, * * * the testator had changed his in-

tention, and determined not to give his wife a life-estate in these two lots, but to give them to the daughter of such life-estate." The uncertainty in that case arose from the language used in the second clause; and so here, if there is any uncertainty, it is in the language of the fourteenth clause, and not in that of the eighth. The rule of construction is that where an estate is given by one clause or part of a will, it cannot be cut down or taken away by a subsequent clause except where by clear and unambiguous terms, and it is sometimes said that, in order to give the latter clause that effect, its language must be as clear as that of the clause giving the estate.

There is, however, in this case, no necessity for resorting to the rules applicable to the construction of a will containing contradictory or repugnant clauses. Courts will always, if possible, so construe wills as to give effect to each and every part of the same. Here that end can be accomplished by simply giving to the words used in the fourteenth clause their ordinary and generally accepted meaning. It is only by refining upon the technical meaning of the word "specifically" as here used, that counsel for appellant are able to make the fourteenth clause inconsistent with the eighth. The rule, however, is "that words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are in all cases to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative." (1 Redf. Wills, p. 428, quoted from Jarman.)

It was clearly the intention of the testator to dispose of all his estate, real and personal, by the fourteenth clause, which had not been bequeathed or devised by those which preceded it; and so the language, "which has not been specifically bequeathed and devised," would ordinarily be understood. Thus construed, effect is given to every part of the will. The decree of the Circuit Court will be affirmed.

As to what words are sufficient to devise after acquired real estate, see notes, *Blaisdell v. Hight*, 1 Am. Prob. Rep. 815; *Byrnes v. Baer*, 2 Am. Prob. Rep. 490; *Briggs v. Briggs*, 5 Am. Prob. Rep. 492.

L. H. and J. P. RICH, Ex'rs, vs. ALBERT SOWLES, Administrator.

[64 Vermont, 408.]

ADMINISTRATOR'S CONTRACT — ACTION — DECLARATION — JUDGMENT.

Though an administrator cannot bind the estate by any debt incurred by him, adding to his name in a declaration *in assumpsit* on such a debt, the words "administrator of" the estate does not render it demurrable. The context will determine that they are used as descriptive of his person and not of the character in which he is sued.

Judgment in such a case is properly rendered against the defendant as administrator, as judgment must follow the writ, and the use of these words does not make the judgment one to be satisfied out of the property of the estate.

EXCEPTIONS from Franklin County Court.

S. E. Royce, for plaintiff.

E. A. Sowles and *H. A. Burt*, for defendant.

Ross, C. J.—The declaration sets forth a good cause of action, and was properly adjudged sufficient against the causes alleged in the demurrer. It commands the attachment of the goods, chattels, or estate of Albert Sowles, administrator of William L. Sowles' estate, and not of the estate of William L. Sowles, of which Albert Sowles is administrator. The words, "administrator of William L. Sowles' estate," are descriptive of the person named as the defendant in the suit. If, by chance, there were two persons of that name in that locality, these descriptive words would

direct the officer serving the writ to the person intended.

The common counts in general *assumpsit* constitute the declaration. Those declare that the defendant, viz., Albert Sowles, that one who holds the office of administrator of the estate of William L. Sowles, is indebted, and made promises, to the testator whose will the plaintiffs are executing. The plaintiffs do not declare, nor seek to recover, upon a promise or undertaking of William L. Sowles, the intestate, of whose estate Albert Sowles is administrator. Inasmuch as the defendant is the legal representative of the estate of William L. Sowles, if the declaration sought a recovery upon the promise or undertaking of the intestate it would be necessary to describe him as such representative. Then the recovery would be against the estate, or the defendant of the estate. The judgment, in such a case, would be against and to be satisfied out of the estate, and not out of the property of Albert Sowles. The words, "administrator of William L. Sowles' estate," in such an action would be descriptive of the capacity in which Albert Sowles was sued, and that he stood as the representative of the estate of William L. Sowles. Hence, when these words in the declaration follow the name of the party, whether they will be deemed descriptive of his person or descriptive of the character or capacity in which he is sued, is determined by the allegations of the declaration. If the declaration is against him personally, they will be held to be descriptive of his person. That is the only office they can serve in such a declaration. They may be rejected as surplusage. If the declaration is against the estate which he represents, and the promises declared upon are not his promises, but the promises of the person he represents, then they will be held to be words properly used, necessary to set forth the representative character in which he sued. The allegations of the declaration and the facts found show a personal promise by the defendant, and these words are only descriptive of the person intended to be named as defendant. The writ might be amended by striking them out. (*Johnson v. Nash*, 20 Vt. 40; *Waterman v. Railroad*,

30 Vt. 614; *Myers v. Lyon*, 51 Vt. 272; *Jones v. Tuttle*, 54 Vt. 488.)

As contended by the defendant, an administrator has no authority, as such representative, to create any debts against the estate. He only has authority, by virtue of his office, to administer upon the estate; that is, to ascertain both its assets and debts, and to put the former in condition to pay the latter, if sufficient, and the surplus, if any, in a condition to be distributed to those legally entitled thereto. Whatever proper expenditures he may make in accomplishing this will be allowed him by the Probate Court out of the estate, on the settlement of his administration account. But if, in caring for and administering upon the estate, it becomes necessary to incur an indebtedness, he can bind himself, and not the estate, for its payment. He cannot incur a debt in the administration of the estate, and bind the estate for its payment. He can bind himself only for such payment. Upon his becoming insolvent, equity will not enforce the payment of such a debt out of the estate. (*Lovell v. Field*, 5 Vt. 218; *Bank v. Weeks*, 53 Vt. 115.)

Whether, when trust or other property not owned by the estate has become mingled with it, a suit may be maintained for its recovery out of the estate against the administrator in his representative capacity, as was held in *De Valengin v. Duffy* (14 Pet. 289), is not involved in this suit, and need not be considered.

The execution for the enforcement of the judgment follows the writ. (*Rider v. Alexander*, 1 D. Chip. 267; *Perry v. Whipple*, 38 Vt. 278; *Wright v. Hazen*, 24 Vt. 143.) As the writ is against the defendant, not representatively but personally, so must the judgment and execution be. Rendering judgment against the defendant, "as administrator," did not make it a judgment to be enforced out of the property of the estate of which the defendant is administrator, but to be enforced against the defendant's own property. Adding "administrator" to his name when the defendant purchased the horses did not bind the estate for their payment, but bound the defendant. No more does

such addition to his name in the judgment affect the nature of the judgment, or change it from a judgment to be satisfied out of the defendant's property to one to be satisfied out of the property of the estate. Such addition in making the contract and rendering the judgment might indicate that the debt was contracted by the defendant in administering upon the estate, and that he claimed that it constituted an item in his administration account. It might be rejected as surplusage, or by way of amendment, without changing the legal nature of the contract or judgment. This disposes of all the contentions insisted upon in this court.

Judgment affirmed.

Contracts of Executors and Administrators.—An executor or administrator can only bind himself by his contracts; he can make no contract binding on the estate. *Kirkman v. Benham*, 28 Ala. 501; *Christian v. Morris*, 50 Ala. 585; *Yarborough v. Ward*, 24 Ark. 204; *Ferry v. Cunningham*, 40 Ark. 185; *Higgins v. Driggs*, 21 Fla. 103; *McFarlin v. Stinson*, 56 Ga. 396; *Lynch v. Kirby*, 65 Ga. 279; *Cornthwaite v. First Nat. Bank*, 57 Ind. 268; *Winter v. Hite*, 3 Iowa, 142; *Dunne v. Derry*, 40 Iowa, 251; *Davis v. French*, 20 Me. 21; *White v. Thompson*, 79 Me. 207; *Johnston v. Union Bank*, 37 Miss. 526; *Studa-backer Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101; *Gerrin v. Myrick*, 41 N. Y. 315; *Austin v. Munro*, 47 N. Y. 360; *Casoni v. Jerome*, 58 N. Y. 315, 321; *Schmittberger v. Simon* 101 N. Y. 554; 5 N. E. Rep. 452; *Murphy v. Naughton*, 68 Hun, 424; 23 N. Y. Supp. 52; *Pinney v. Johnson's Adm'r*, 8 Wend. 500; *East Tennessee Iron W. Co. v. Gaskell*, 2 Lea, 724; *Merchants' Nat. Bank v. Weeks*, 53 Vt. 115; 2 Am. Prob. Rep. 145. The addition of the official character to their signatures in executing written contracts and obligation has no significance and operates merely to identify the person. *McFarlane v. Stinson*, 56 Ga. 396; *Schmittler v. Simon*, *supra*; *Finney v. Johnson's Adm'r*, 8 Wend. 500. As also in the case of guardians. *Thacher v. Dinsmore*, 5 Mass. 299; *Forster v. Fuller*, 6 Mass. 58. And of other trustees. *Duval v. Craig*, 2 Wheat. 45; *Taylor v. Davis' Adm'r*, 110 U. S. 380; 4 Sup. Ct. Rep. 147; *Pumpelly v. Phelps*, 40 N. Y. 59; *Taft v. Brewster*, 9 Johns. 324; *Hills v. Bannister*, 8 Cow. 31; *Carr v. Branch*, 85 Va. 597, 605; 8 S. E. Rep. 476. And not to limit and qualify their liability. *Pumpelly v. Phelps*, *supra*; *Schmittler v. Simon*, *supra*; *Sieckman v. Allen*, 3 E. D. Smith, 561; *Pinney v. Johnson's Adm'r*, *supra*; *Carr v. Branch*, *supra*. Such words will be treated as surplusage. *Higgins v. Driggs*, *supra*; *McFarlin v. Stinson*, *supra*; *Schmittler v. Simon*, *supra*; *Sieckman v. Allen*, *supra*; *Pinney v. Johnson's Adm'r*, *supra*.

Hence such obligations are enforceable against them individually only. *Duval v. Craig*, 2 Wheat. 45, 57; *Kirkman v. Hanna*, 28 Ala. 501; *Christian v.*

Morris, 50 Ala. 585; Winter v. Hite, 3 Iowa, 142; Dunne v. Derry, 40 Iowa, 251; Boyd v. Johnston, 89 Tenn. 284; 14 S. W. Rep. 874; Ferrin v. Myrick, 41 N. Y. 315, 319; Schmittler v. Simon, 101 N. Y. 554; 5 N. E. Rep. 452; Bucklin v. Chapin, 1 Lans. 443, 450; Demott v. Field, 7 Cow. 58; Pinney v. Johnson's Adm'r, 8 Wend. 500. And if the executor or administrator becomes insolvent, equity will not enforce the payment of such a debt out of the estate. Lovell v. Field, 5 Vt. 218; Bank v. Weeks, 53 Vt. 115. This principle has been applied to debts contracted for funeral expenses. Ferrin v. Myrick, 41 N. Y. 315; Murphy v. Naughton, 68 Hun, 424; 23 N. Y. Supp. 52. For services rendered to the executors in their official capacity. Austin v. Munro, 57 N. Y. 360. To notes and drafts made by an executor or administrator. Christian v. Morris, 50 Ala. 585; Higgins v. Driggs, 21 Fla. 103; McFarlin v. Stinson, 56 Ga. 396; Lynch v. Kirby, 65 Ga. 279; Cornthwaite v. First Nat. Bank, 57 Ind. 268; Winter v. Hite, 3 Iowa, 142; Dunne v. Derry, 40 Iowa, 251; Davis v. French, 20 Me. 21; White v. Thompson, 79 Me. 207; Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; Boyd v. Johnston, *supra*. And to the endorsement of notes given to one as executor or administrator. Sleekman v. Allen, 3 E. D. Smith, 561; Weider v. Osborn, 20 Or. 307; 25 Pac. Rep. 715; Mackay v. St. Mary's Church, 15 R. I. 121; 23 Atl. Rep. 108. To an acceptance by an executor of a draft drawn on him, though it contained a direction to charge the amount against the drawer and the estate. Schmittler v. Simon, *supra*. Or though the acceptance was conditioned on the receipt of assets. Perry v. Cunningham, 40 Ark. 185. To the guarantee of notes made to them in payment of debts due the estate. Johnson v. Union Bank, 37 Miss. 526. Executors are personally bound by a covenant to abide by and perform an award contained in a submission entered into by them; although in form they covenanted as executors, unless from the other parts of the submission it appears that the intention was to bind themselves only to pay out of the assets in due course of administration. (Citing Barry v. Rush, 1 Term, 691; Worthington v. Barlow, 7 id. 453; Love v. Honeybourne, 4 Dowling & Ryland, 814; Summer v. Williams, 3 Mass. 162; Childs v. Nonins, 2 B. & Bing. 460; Ring v. Thorn, 1 Term, 489; Wood v. Tunncliffe, 74 N. Y. 38, 46.

No action can be maintained on such a contract against an executor or administrator in his representative capacity. Christian v. Morris, 50 Ala. 585; Higgins v. Driggs, 21 Fla. 103; Davis v. French, 20 Me. 23; Ferrin v. Myrick, 41 N. Y. 315; Austin v. Munro, 47 N. Y. 360; Beatty v. Gingles, 8 Jones (N. C.) 301; In re Dunham's Estate, 8 Ohio Cir. Ct. Rep. 160. And a cause of action on which the executor or administrator is thus personally liable cannot be joined with one against him in his representative capacity. Ferrin v. Myrick, 41 N. Y. 315, 322; Pugsley v. Aiken, 14 Bark. 114; Meyer v. Cole, 12 John. 349; Demott v. Field's Adm'r, 7 Cow. 58; Gillett v. Hutchinson's Adm'r, 24 Wend. 184. Though the plaintiff is described as executor or administrator, but the cause of action set forth is one which might be maintained by him without reference to his official character, the words executor or administrator will be regarded as mere *descriptio personarum* and surplusage. Merritt v. Seaman, 6 N. Y. 168; Stillwell v. Carpenter, 62 N. Y. 639; Litchfield v. Foote, 104 N. Y. 548. A distinction is sometimes made between the cases in which

the official title is merely added to the names of the defendants, in which cases this addition is held to be merely a description of the person and to authorize a judgment against them individually, and those cases in which the use of the word "as" in connection with the official title is said to show that the suit is by or against them in their official capacity. *Espalla v. Richards*, 94 Ala. 159; 10 So. Rep. 187; *Chouteau v. Suydam*, 21 N. Y. 179; *Austin v. Munro*, 47 N. Y. 860, 866; *Stillwell v. Carpenter*, 62 N. Y. 639; *Murphy v. Naughton*, 68 Hun, 424; 28 N. Y. Supp. 52. A complaint against one as executor or administrator cannot be amended so as to charge him personally. *Taylor v. Taylor*, 43 Ala. 649; *Beatty v. Gingles*, 8 Jones (N. C.) 802.

In actions against executors or administrators on causes of action accruing in the life time of the decedent, the judgment should not be against the defendant generally, but should direct that it be made out of the goods of the estate. *Banks v. Speers*, 97 Ala. 560; 11 So. Rep. 841; *Davis v. Lamb*, (Cal.), 35 Pac. Rep. 306; *Mattison v. Childs*, 5 Colo. 78; *Jones v. Perot*, 19 Colo. 141; 34 Pac. Rep. 728; *Cooper v. Livingston*, 19 Fla. 684, 695; *Voorhees v. Eubank*, 6 Iowa, 274; *Neeley v. Planters' Bank*, 12 Miss. (4 Sm. & M.) 113; *Barrow v. Wade*, 15 Miss. (7 Sm. & M.) 49; *Fisher v. Chadwick*, (Wyo.), 34 Pac. Rep. 889. As also in the case of a note made by the decedent jointly with another, the executors having by agreement with the other maker assumed all liability on the note, but stipulating that they should not be held liable individually. *Beattie v. Latiner*, S. C.; 20 S. E. Rep. 53. In an action against the administrator in his representative capacity upon a cause of action created by the intestate judgment against "the defendant" is a judgment *de bonis intestati* and not *de bonis propriis*. *Stone v. Kaufman*, 25 Ark. 186.

A judgment against "the defendant" as administrator on a demand created by the intestate, authorizes execution *de bonis intestati* only, though containing no direction as to the manner of satisfaction. *Guice v. Sellers*, 43 Miss. 52. The addition of "executor" to the name of a party against whom a judgment is rendered does not of itself prevent the judgment from being enforced against him individually. *Tinsley v. Lee*, 51 Ga. 482; *Gowan v. Gentry*, 32 S. C. 369; 11 S. E. Rep. 82. The praecipe, summons and declaration being against the executor or administrator of an estate, on proper proof the judgment should be entered to be levied on the assets of the estate in his hand. *Higgins v. Driggs*, 21 Fla. 103, 110. A judgment against one "as executor" but not expressing of whose property the execution shall be levied, is informal. *Christian v. Morris*, 50 Ala. 585. Judgment and execution should follow the writ. *Rider v. Alexander*, 1 D. Chip. 267; *Perry v. Whipple*, 38 Vt. 278; *Wright v. Hazen*, 24 Vt. 143. An execution against an administrator should be suspended when it does not appear from its face whether it is to be satisfied out of the assets of the estate or the individual property of the defendant. *Higgins v. Driggs*, 21 Fla. 103.

MOSBY vs. PAUL'S ADMINISTRATOR.

[88 Virginia, 533.]

CHILDREN AS WORD OF LIMITATION—TRUST.

Under a devise of property to be divided equally among the children of the testator, to each daughter and her children, one share, the daughters take an absolute fee, the words "and her children" being used as words of limitation and to show the motive for the gift.

Under a devise to a son of property "estimated at ten thousand dollars, three thousand of which he is to pay to a daughter and 'her children in trust' the interest of the daughter in the legacy is an absolute fee simple."

APPEAL from Circuit Court, Augusta County.

G. M. Cochran, for appellant.

FAUNTLEROY, J.—The record shows that James M. Paul, of Augusta county, Va., died in January, 1891, leaving a will, which was duly probated in the County Court of August county, at the January term, 1891. No executor being named in said will, John W. Paul, a son of the testator, was, by consent of all parties in interest, duly appointed by the said court as administrator of the said estate, with the will annexed. The said John W. Paul, as administrator *c. t. a.*, instituted this suit at the May term, 1891, in the Circuit Court of Augusta county, for the administration of the said estate under the instructions of the said court, and for the construction of his testator's will.

The testator left three sons, John W. Paul, James C. Paul, and Lamartine H. Paul, and two daughters, Mrs. Louisa S. McComb and Victoria V. Mosby.

The questions presented arise on the proper construction of the devises and bequests to the said daughters of the testator, made in the first, third, and eighth clauses of the will, as follows: "(1) I bequeath to my daughter Louisa S. McComb and her children the tract of land upon which I now reside, containing about one hundred and forty-seven

acres, valued at six thousand dollars. I also give them the one-half interest in the plantation in Louisa county, Virginia, on which W. A. B. McComb and family now live." The third clause reads: "I desire that my son James C. Paul have the home place in Fort Bend county, Texas, estimated at ten thousand dollars, three thousand dollars of which he is to pay to my daughter Victoria V. Mosby and her children in trust." By the eighth clause the testator divides the residuum of his estate into five equal parts, and gives one part to each of his children. In giving to his daughters, he uses this language: "Louisa S. McComb and her children, one share; Victoria V. Mosby and her children, one share."

The court was invoked, in the bill, to construe these devises and legacies to the daughters and their children, and to determine what is the estate of the mothers, and what interest, if any, of their children under the will.

The court, by its decree of June 2, 1891, reaffirmed by its vacation decree of August, 1891, upon the petition for a rehearing, construed the devises and legacies to give to each of the said daughters a life-estate, with remainder to her children, and directed the pecuniary legacies to the said daughters to be paid to the general receiver of the court, and the said receiver to invest and manage the same, and pay over to the said daughters the yearly interest; thereby making the said daughters of the testator wards of chancery the balance of their lives. From these decrees the said Victoria V. Mosby has obtained this appeal; and she charges that the said decrees are erroneous in the construction given to the will of James M. Paul as to her rights thereunder.

The guardian *ad litem* of the infants and counsel for the children contends that the ancient common law rule, as established in Wild's Case, (6 Coke, 17), shall be applied to the language used by the testator, which would give these devises and legacies to the mother and the children jointly, in each case.

The appellant, Mrs. Victoria V. Mosby, contends to show

that the whole of these devises and legacies goes to the mother, the children being named simply "to show the motive for the gift;" that the words "and her children," annexed to the gift to the daughter, are words of limitation, and not words of purchase; and that they were not intended by the testator, nor do they operate in law, to diminish the portion given to the daughter.

The court below, by its construction, ignores both of these contentions, and makes the mother a life-tenant, and "her children" vested remaindermen in fee,—a construction which is untenable and unprecedented; and all that is left for this court to do is to adopt the construction claimed by the appellant, or to apply the old rule in *Wild's* case, and say that the children have, by the will, present equal rights as tenants in common, or joint-tenants, with their mother, to the exclusion of after-born children. At the date of the will Victoria V. Mosby was, and she yet is, a young married woman; and she may yet have many more children. There are many cases decided by this court in which the language of these legacies has been construed, and the question has been presented in every conceivable form. Yet in every instance the mother was held to take the whole estate given, and the language "and her children" construed to merely indicate the motive of the testator in making the devise or bequest, and his intention that his bounty should go to the mother and her issue, or to the mother and the heirs of her body. And this is equally the rule or *rationale* of the decisions where the estate given to the "mother and her children" is the absolute, and not merely a life, estate. (*Wallace v. Dold*, 3 Leigh, 258; *Leake v. Benson*, 29 Grat. 153; *Rhett v. Mason*, 18 Grat. 541; *Bain v. Buff*, 76 Va. 371; *Seibel v. Rapp*, 85 Va. 28; 6 S. E. Rep. 478; *Merryman v. Merryman*, 5 Munf. 440; *Atkinson v. McCormick*, 76 Va. 791; *Mauzy v. Mauzy*, 79 Va. 537; *Smith v. Fox*, 82 Va. 763; 1 S. E. Rep. 200; *Waller v. Catlett*, 83 Va. 200; 2 S. E. Rep. 280; *East v. Garrett*, 84 Va. 523; 9 S. E. Rep. 1112.) In 3 Lomax, Dig. 304, it is said: "In some instances, however, notwithstanding the existence of chil-

dren, the court seemed to have inclined to construe 'children' as a word of limitation."

In the third clause of the will the testator says: "I desire that my son James C. Paul have the home place in Fort Bend county, Texas, estimated at ten thousand dollars, three thousand dollars of which he is to pay to my daughter Victoria V. Mosby and her children in trust,"—thereby indicating and directing that his daughter was the hand to receive the money which his son was directed to pay to the mother, and not to hold in trust, though, even had he been interposed and constituted a trustee, it would not have altered the case. In *Waller v. Catlett*, the testator, Thurston, gave to Catlett a thousand dollars, in trust for the sole and separate use of Nannie Waller and her children; and in that case it was held, Judge LACY delivering the opinion of this court, the gift to the wife and her children was a gift to the wife of the entire estate, and that the reference to the children only indicated the motive for the gift. In *Mauzy v. Mauzy* (79 Va. 539), LEWIS, P., says: "The language 'wife and children' merely indicated the motive for the conveyance to her." In *East v. Garrett* (84 Va. 523; 9 S. E. Rep. 1112), Judge RICHARDSON, delivering the opinion of the court, says: "The language 'and her children' is synonymous with 'her issue,' and not intended to indicate the donee or legatee, but the duration and limitation of the estate given." So in *Bain v. Buff* (75 Va. 371), this court held that the estate was given to the mother alone, and that the words "for use of herself and children" did not give any estate to the children) but simply indicates the motive for the gift to the mother.

Under this unbroken line of decisions by this court we are of opinion to annul and reverse the decrees complained of as wholly erroneous in the construction given to the third and eighth clauses of the will of James M. Paul; and our judgment is that the appellant, Victoria V. Mosby, is entitled, under the will, to the absolute fee-simple estate in the devises and legacies to her and her children, who are named merely to indicate the motive of the gift to her.

The cause will be remanded, with directions to the Circuit Court of Augusta county to proceed in accordance with this opinion.

Decree reversed.

Children as word of purchase or limitation.—Under a devise to a daughter “for the support of herself and her children,” the daughter takes an absolute fee. In *re Cressler's Estate*, 161 Pa. St. 427; 29 Atl. Rep. 90.

In the absence of circumstances indicating that the word is used synonymously with heirs, “children” is a word of purchase and not of limitation. *Wild's Case*, 6 Coke R. 17; *Dunn v. Davis*, 12 Ala. 135; *Estate of Utz*, 48 Cal. 200; *Earnshaw v. Daly*, 1 App. D. C. 218; *Beacroft v. Strawn*, 67 Ill. 28, 38; *Carr v. Estill*, 16 B. Monr. (Ky.) 309, 313; *Turner v. Patterson*, 5 Dana (Ky.), 292, 296; *Sisson v. Seabury*, 1 Sum. 235; *Annable v. Patch*, 20 Mass. (3 Pick.) 360, 365; *Hatfield v. Sohler*, 114 Mass. 48, 52; *Stump v. Jordan*, 54 Md. 619, 631; *Halstead v. Hall*, 60 Md. 209; 2 Am. Prob. Rep. 462, 464; *Fales v. Currier*, 55 N. H. 398; *Stokes v. Tilley*, 9 N. J. Eq. 180; *Chrystie v. Phyfe*, 19 N. Y. 344; *Cochrane v. Schell*, 140 N. Y. 516, 539; 35 N. E. Rep. 971; *Tayloe v. Gould*, 10 Barb. 388; *Murphy v. Harvey*, 4 Edw. 131; In *re Saunders*, 4 Paige, 293, 295; *Osborn*, 4 Paige, 336; *Rogers v. Rogers*, 3 Wend. 503; *Armstrong v. Hannon v. Moran*, 1 Bradf. 314; *Guthrie's Appeal*, 37 Pa. St. 9, 14; *Chew's Appeal*, 37 Pa. St. 23; *Coursey v. Davis*, 46 Pa. St. 23; *Schafer v. Eneu*, 54 Pa. St. 304; *Affolter v. May*, 115 Pa. St. 54; 8 Atl. Rep. 20; *Perry v. Calhoun*, 8 Humph. (Tenn.) 551; *Stubbs v. Stubbs*, 11 Humph. (Tenn.) 43; *Bowers v. Bowers*, 4 Heisk. (Tenn.) 293, 298; *Moon v. Stone's Ex'r*, 19 Gratt 130, 262. And it is to be construed a word of limitation, only when that is absolutely necessary to effectuate the testator's intention. *Dunn v. Davis*, *supra*; *Buffer v. Bradford*, 2 Atk. 221. In a devise to a grandson and to his male children, lawfully begotten of his body, and their heirs forever, the grandson having no children at the death of the testator, Judge STORY held that the grandson took a life-estate with a contingent remainder to his male children, on the ground that if the words were construed as words of purchase, the devise would be void for want of proper objects *in esse* to take. *Sisson v. Seabury*, 1 Sum. 235. Even in those states in which the rule in *Shelley's Case* applies, a bequest to one for life and at his death to his children, passes only an estate for life in the first taker, his children taking vested remainders. *Beacroft v. Strawn*, 62 Ill. 28. So, also, of a devise to one and at his death “to his heirs or children.” *Dunn v. Davis*, 12 Ala. 135. Or “to such of her children as may survive her.” *Guthrie's Appeal*, 37 Pa. St. 9. So of a bequest to daughters “and their children, heirs of their body.” *Goss v. Eberhardt*, 29 Ga. 545. So a devise to a son “for his support and estate to be and remain bequeathed to his children for their natural life.” *Oyster v. Oyster*, 100 Pa. St. 538; 3 Am. Prob. Rep. 372. And the addition of words of inheritance to the gift to the children does not enlarge the estate of the parent. *Halstead v. Hall*, 60 Md. 209; 2 Am. Prob. Rep. 462, 464; *Chrystie v. Phyfe*, 19 N. Y. 344, 355; *Chew's Appeal*, 37 Pa. St. 23.

Under one branch of what is known as the rule in Wild's Case (6 Coke R. 17), a devise or grant to one and his children, he having children in being capable of taking, conveys an estate in joint tenancy (or in common) to the parent and children. *Nimmo v. Stewart*, 21 Ala. 682; *Furlow v. Merrill*, 23 Ala. 705; *Estate of Utz*, 43 Cal. 200; *Turner v. Patterson*, 5 Dana (Ky.), 292, 295; *King v. Rea*, 56 Ind. 1; *Biggs v. McCarty*, 86 Ind. 352; 3 Am. Prob. Rep. 278, 283; *Annable v. Patch*, 20 Mass. (8 Pick.) 360; *Armstrong v. Morn*, 1 Bradf. 314; *Graves v. Graves*, 55 Hun, 58; 8 N. Y. Supp. 284; *Hannan v. Osborn*, 4 Paige, 336, 341; *Graham v. Flower*, 13 S. & R. 439; *Bowers v. Bowers*, 4 Heisk. (Tenn.) 293. The children then in being, though unborn, taking equally with the others. *King v. Rea*, *supra*; *Biggs v. McCarty*, *supra*. But those born afterwards taking nothing. *King v. Rea*, *supra*; *Biggs v. McCarty*, *supra*. But under a deed to one and her heirs, the children of her husband, the children then living were held to take as joint tenants with the mother. *Umfreville v. Keeler*, 1 T. & C. (N. Y. Supm.) 486. It has been held that the use of the words "children of her body" indicate an intention that all the children, including those afterwards born, should share. *Annable v. Patch*, 20 Mass. (3 Pick.) 360, 363.

But the parent will take a life-estate and the children a remainder where the context indicates that the parent is to have the sole enjoyment during life. *Jones v. Jones*, 7 Ga. 76; *Jennings v. Parker*, 24 Ga. 621; *Turner v. Patterson*, 5 Dana (Ky.), 292, 296. Or if it appears to have been intended that the parent should take a life estate only. *Webb v. Holmes*, 3 B. Monr. (Ky.) 404; *Stump v. Jordan*, 54 Md. 619, 629; *Halstead v. Hall*, 60 Md. 209; 2 Am. Prob. Rep. 462; *Chrystie v. Phyfe*, 19 N. Y. 344, 345; *Hannan v. Osborn*, 4 Paige, 336, 341; *Coursey v. Davis*, 46 Pa. St. 23; *Bowers v. Bowers*, 4 Heisk. (Tenn.) 293.

Another branch of the rule in Wild's Case is, that if there were no children, the term is to be construed as a word of limitation and as equivalent to issue of his body, thus creating an estate tail. *Furlow v. Merrill*, 23 Ala. 705; *Hannan v. Osborn*, 4 Paige, 336, 341. The reason for this construction being that if the word children were interpreted as a word of purchase future children could not take at all, thus frustrating the intentions of the testator in their favor. *Carr v. Estill*, 16 B. Monr. (Ky.) 309, 313; *Stump v. Jordan*, 54 Md. 619, 628; *Sisson v. Seabury*, 1 Sum. 235; *Chrystie v. Phyfe*, 19 N. Y. 344, 345. In those states, however, in which estates tail are converted by statute into estates in fee simple, the intention of the testator would be equally frustrated by such a construction, and the rule has been adopted that under such circumstances the parent takes a life estate, remainder to the children. *Carr v. Estill*, 16 B. Monr. (Ky.) 309, 313.

Under a gift to one for life remainder to his children, the remainder vest in the children *in esse* at the death of the testator. *Turner v. Patterson*, 5 Dana (Ky.), 292, 296; *Stump v. Jordan*, 54 Md. 619, 629; *Dingley v. Dingley*, 5 Mass. 535; *Hatfield v. Sohler*, 114 Mass. 48, 52; *In re Saunders*, 4 Paige, 293, 298; *Hannan v. Osborn*, *id.* 336, 342; *Chew's Appeal*, 37 Pa. St. 23; *Bowers v. Bowers*, 4 Heisk. (Tenn.) 293. Subject to open and let in after-born children. *Turner v. Patterson*, *supra*; *Stump v. Jordan*, *supra*; *Dingley v. Dingley*,

supra; Annable v. Patch, 20 Mass. (8 Pick.) 369. Hatfield v. Sohler, *supra*; In re Saunders, *supra*; Hannan v. Osborn, *supra*; Chew's Appeal, *supra*; Coursey v. Davis, 46 Pa. St. 23; Daly v. Koons, *supra*; Bowers v. Bowers, *supra*. And no right of survivorship exists on the death of any child in the life of its parents, but the interest of such child goes to its heirs or devisees. Beacroft v. Strawn, 67 Ill. 28, 33; Turner v. Patterson, *supra*; Dingley v. Dingley, *supra*; Hatfield v. Sohler, *supra*; Daley v. Koons, *supra*.

In every case of a future devise to children, as a class, the remainder is held to vest on the death of the testator. Gibbens v. Gibbens, 140 Mass. 102; 5 Am. Prob. Rep. 92; 3 N. E. Rep. 1; Dole v. Keys, 143 Mass. 237; 9 N. E. Rep. 625; Dodd v. Winship, 144 Mass. 461; 11 N. E. Rep. 588; Moore v. Littel, 41 N. Y. 66; Knight v. Wall, 2 Dev. & B. (N. C.) 125; Chew's Appeal, 37 Pa. St. 23, 28. Or if there be no child living at the death of the testator, as soon as a child is born. Hovey v. Nellis, 98 Mich. 374; 57 N. W. Rep. 255; Taggart v. Murray, 53 N. Y. 233, 238; Smith v. Scholtz, 68 N. Y. 41, 61; Daley v. Koons, 90 Pa. St. 246. Subject to open and let in after-born issue. Cox v. Handy, 78 Md. 108, 122; 27 Atl. Rep. 227; Dole v. Leyes, *supra*; Cheeves v. Circuit Judge, 48 Mich. 6; 2 Am. Prob. Rep. 60; Hovey v. Nellis, *supra*; Ballentine v. Wood, 42 N. J. Eq. 552; 5 Am. Prob. Rep. 244; Moore v. Littel, *supra*; Taggart v. Murray, *supra*; Smith v. Scholtz, *supra*; Knight v. Wall, *supra*; Chew's Appeal, *supra*; Daley v. Koons, *supra*. And in the absence of an ulterior disposition of the shares of those dying before the period of distribution, such shares are transmitted to their representatives. Knight v. Wall, *supra*. And where provision is made for substitution of issue in case of death during the precedent estate, subject to be divested by the death of a child leaving such issue. Cox v. Handy, *supra*; Gibbens v. Gibbens, *supra*; Dodd v. Winship, *supra*; Smith v. Scholtz, *supra*; Chew's Appeal, *supra*.

FRANKLIN v. FRANKLIN.

[91 Tennessee, 119.]

ADMINISTRATOR — LIMITATION — DISCOVERY OF WILL — CHILDREN — HEIRS.

The discovery of a will does not render the previous appointment of an administrator void, but merely voidable, and does not effect the running of the statute of limitations.

Under a bequest to a brother of the interest arising from certain money the principal to go to the children, if he has any, the children take as a class subject to fluctuation in numbers by reason of births and deaths.

In the provision that if the brother died without heirs, a sister should have the fund, the word heirs is used in the sense of children.

CROSS-APPEALS from Chancery Court, Sumner county;
GEORGE E. SEAY, Chancellor.

*C. R. Head, James W. Blackmore, R. K. Gillespie and
T. C. Mulligan*, for complainants.

J. J. Turner, S. F. Wilson, and B. D. Bell, for defend-
ants.

SNODGRASS, J. — This is a suit to recover the interest of John Armfield Franklin in the estate of John Armfield, who died testate in Grundy county, Tenn., in 1871, leaving a large personal estate to five legatees—testator's wife and four others. The widow dissented from the will, and took her interest under the law upon dissent, so that only the remainder of the estate was left to pass under the will. The four legatees entitled to it were the present complainants, Ed. N. Franklin, John Armfield Franklin, Mrs. A. Vanbibber, and Mrs. B. Archer. One of these—John Armfield Franklin—died in November, 1871. Ed. N. Franklin was appointed and qualified as administrator of his estate December, 1876. John Armfield Franklin had in fact died testate, but his will was not discovered for many years thereafter, and not established (it being contested) until several years later—facts to be more particularly stated hereinafter.

The defendant J. W. Franklin was named as executor in the will of John Armfield. He qualified as such in the County Court of Grundy county, October 2, 1871, and made a settlement of the estate with the clerk of said court July 30, 1875. In this settlement he was charged with \$27,342.99, and credited with \$12,209.64, leaving balance then in his hands of \$15,135.45. On September 21, 1877, he made a final settlement, showing balance in hands from former settlement, \$15,133.45; collected since, \$30,327.72; total, \$45,461.17; credits since, \$14,228.35; due distributees,

\$31,232.82. Amount due to the widow of this sum was \$10,410.94, leaving \$20,821.88 to pass under the will, or \$5,205.22 to each of the three living legatees, and the same amount to J. W. Franklin, who was the father and distributee of the dead one, John Armfield Franklin. This sum he kept as such distributee, and appropriated. The remainder he paid to the parties already named entitled to it. All the parties acquiesced in the settlement, and the present complainant gave his receipt for balance in full due him under it December 24, 1877. In January, 1885, defendant J. W. Franklin, as executor of John Armfield, collected a claim of his testator's estate against the United States government of \$18,000, which, after deducting executor's compensation and attorney's fees paid for its collection and paying the widow, left in his hands for distribution the sum of \$1,890 for each living legatee and the distributee of John Armfield Franklin. He appropriated this \$1,890 as such distributee, and he also applied the same amount due Ed. N. Franklin on debts which he held against Ed. N. Franklin. The other legatees he paid in full.

In the meanwhile, about the time of the collection and disposition of this fund, a will of John Armfield Franklin was found. This will, which we quote for purpose of construction hereinafter, is as follows: "Washington, Ga., Oct., 1871. This is my last will and testament. I will and bequeath to my brother Edward N. Franklin my entire estate, including my interest in my Uncle John Armfield's estate, my shot-gun, Winchester rifle, watch, goldheaded cane, and everything that is mine. He is to have the interest arising from a proper investment of the money from my uncle's estate, to do with as he pleases, but the principal is to go to his children, in case he has any. In case he dies without heirs, I want my sister Mrs. Adele Vanbibber to have it on same conditions. I appoint my brother Ed. N. Franklin to qualify as my administrator, and act without bond. I want him to buy a ticket to Louisville, Ky., for Alice, and give her \$500.00. J. A. FRANKLIN."

It was offered for probate at the April term 1885, of the County Court of Sumner county, was contested, and finally established as a will, and ordered probated, and admitted to probate on the 13th April, 1891, in the County Court, under decree of this court pronounced March 6, 1891. When the will was admitted to probate Ed. N. Franklin qualified as executor. On 28th of April, 1891, he procured an order of the County Court annulling and revoking his appointment as administrator of estate of John Armfield Franklin, which had been made, as before recited, on the 23d December, 1876.

Before this will was admitted to probate, Ed. N. Franklin, in his own name, and as next friend of his minor children, legatees under the discovered will, filed a bill *quia timet*, alleging facts of discovery and pending contest of the will of John Armfield Franklin, and seeking to bring the executor of John Armfield to a settlement. This bill was filed 24th March, 1890.

After the will was admitted to probate, and on 29th April, 1891, he filed an amended and supplemental bill as executor of said will and as next friend of said minors for same purpose—that is, to compel settlement by the executor, and to recover the distributive share of John Armfield Franklin in John Armfield's estate, which, as we have before seen, had been received and appropriated by J. W. Franklin, as distributee of the estate of his deceased and supposed intestate son.

The defense was the statute of limitations of three, six and ten years. By cross-bill defendant also sought to have his own claims against Ed. N. Franklin set off against any recovery Ed. N. might show himself entitled to as legatee of John Armfield Franklin.

Whether the first bill *quia timet* can be considered as arresting from date of its filing the statute of limitations, as intimated such a bill might do in the case of *Brown v. Brown* (14 Lea, 259,) and thereby make it in time to save the bar of the statute of six years, if J. W. Franklin must be treated as having held the \$1,890 as distributee and not

as executor, since it was received in January, 1885, the court deems it unnecessary to decide, though it does decide that six, and not three, years is the least time that could bar such action. By the majority so determining, the court also holds that, sued as executor who had made no settlement as to the last money of the estate received in January, 1885, the only statute which could be applicable in his favor was that of ten years. The question is whether that can be relied on. The chancellor held it could not, and defendant appealed.

The theory upon which it is now insisted by complainant that this statute did not run is that the appointment of Ed. N. Franklin as administrator of estate of John Armfield Franklin in 1876 was void, and that, therefore, there was no one capable of suing until the appointment and qualification of the executor in 1891.

The first appointment is assumed to be void because John Armfield Franklin did not die intestate, and it is insisted that the County Court, therefore, had no jurisdiction to appoint an administrator. If the contention be true that the appointment was void, then the statute did not run, if the appointment was valid; if only voidable, the statute did run,—and this is the main question in the case.

The appointment was not void. This question is not an open one in this state. (*Pinkerton v. Walker*, 3 Hayw. [Tenn.] 220; *Baldwin v. Buford*, 4 Yerg. 20.)

In England, at common law, the rule prevailed that an appointment of an administrator by the ordinary, made in derogation of the right of an executor qualified or acting with or without probate of the will, (for there he could do almost all the acts incident to his office, except some relating to suits, before probate, — (1 Williams, Ex'rs, 6th Am. ed., top pp. 338, 347), or who had not renounced the trust, or from whom the will had been concealed, (by party obtaining the letter, as explained by Judge FREEMAN in dissenting opinion in *Brown v. Brown*, (14 Lea. 383), was void. See 1 Williams, Ex'rs, (6th Am. ed.), bk. 6, c. 3, top p. 665.

The rule was recognized, at least to the full extent in

case of an appointment where there were living executors, appointed and qualified, and capable of acting, in two cases in the Supreme Court of the United States. (*Griffith v. Frazier*, 8 Cranch, 9; *Kane v. Paul*, 14 Pet. 33.)

But in the former it was distinctly recognized as the rule that, if a court grant administration where there is an executor who has not qualified, its act, though erroneous, is valid until repealed, (25, 26): and the latter refers to this case as authority. Both are digested as deciding this principle by legitimate deduction in the Indexed Digest of Supreme Court Reports, vol. 1, p. 793.

Here there is no case for the application of the English doctrine of "concealment" if the entire rule on that subject prevailed in this state, because there was no pretense that the will was concealed by defendant or any one else.

But in the 4 Yerg. Case, already cited, Judge CATRON points out the distinction between the executor's right derived almost exclusively from the will under the English law, and his right under our law as affected by statute, and shows the English rule so found not applicable here. Pages 19-21. And the distinction is further elaborated in *Fay v. Reagar*, (2 Sneed, 200); and *Killebrew v. Murphy*, (3 Heisk. 551),—the latter case probably going too far in assuming the existence of certain power in the executor in advance of qualification, though the power did exist in the same person as widow, and hence the case was on this point correct upon its facts.

Under our law the County Court is a court of general and exclusive jurisdiction on the subject of administration, and when it makes an appointment of an administrator on the estate of a deceased resident of this state the appointment is valid until revoked.

It is true that residence in a given county like intestacy is made a requisite of the power to appoint, and it has been said an appointment made by the County Court of a county in which a deceased had no residence at time of death is "void." *Wilson v. Frazier* (2 Hump. 30.)

But the term was inaccurately used for "voidable," for the court, in the very case in which it was used, held that it was only voidable, and that to adjudge them void there must be a contest in the court where made; and this exact point was afterwards decided in the case of *Johnson v. Gaines*, (1 Cold. 288), and again explicitly determined in the case of *Railway Co. v. Mahoney*, (89 Tenn. 311; 15 S. W. Rep. 652.)

There it was said that the County Court was authorized to determine for itself the existence of the facts which authorized the appointment, and having done so, the appointment was not void. Page 318.

It is true that in that case there was no question of intestacy, and the question was one of residence or inhabitancy, and the principle was not extended there beyond the case of an admitted intestate; but intestacy, like inhabitancy, is one of the facts the County Court must determine, and the two questions fall together within the power of the court to settle when the appointment of an administrator is asked. When the appointment is made, both are adjudged, and that is conclusive until reversed or vacated. (*Schluter v. Bank*, [N. Y. App.] 22 N. E. Rep. 572), and authorities cited.

In the *Schluter Case*, which was a well-considered one where many authorities were referred to in argument and by the court, the court said: "Our attention has been called to no case, and we are confident that none can be found, holding that the subsequent discovery of a will and its admission to probate renders the prior appointment of an administrator absolutely void, so as to give no protection to persons who, in dealing with the administrator have acted on the faith thereof." (Page 513, citing, further, *Wærner Adm'n*, 568, 571, 588.)

It would have been more nearly correct, if not absolutely so, to have said, "No modern case can be found so holding." See, also, *Bigelow's Ex'r v. Bigelow's Adm'rs*, (4 Ohio, 138); *Record v. Howard*, (58 Me. 225); *Clark v. Pishon*, (31 Me. 504.)

Like intestacy, as we have seen, the question of residence has been treated as a jurisdictional one, and there are cases cited in the books in which it has been held that finding it incorrectly by the court authorized to make the appointment rendered the appointment void. There were a number of these cases in Massachusetts. See cases collected in 1 Williams, Ex'rs, (6th Am. ed.) top p. 631, note c.

But the rule is now changed in that state by statute to meet the hardship involved in such a judicial view. (Id.); and specially opinion in *Record v. Howard*, (58 Me. 225.)

The only apparent qualification of that doctrine (for it is not really so) is the appointment of an administrator on the estate of a living man, for this is universally held void, and that upon the ground that no court is vested with such jurisdiction. (*Railway Co. v. Maloney*, 89 Tenn. 319; 15 S. W. Rep. 652; *Moore v. Smith*, 73 Amer. Dec. 122, and notes; *Thomas v. People*, 47 Amer. 458, and notes; 107 Ill. 517.)

It is the one fact which must exist to give any court jurisdiction. When it exists, the others, of residence and intestacy, are open to proof. If decided erroneously, the appointment may be voidable, but is not void. One court went to the extent of holding that erroneous ascertainment of this fact did not make such an appointment void; but subsequently the same court held that appointment void, it appearing that the court in fact had not received evidence of it. (*Rogerigas v. Institution*, [N. Y.] 32 Amer. Rep. 309.)

When the question first arose in this state it was by a divided court that it was settled adversely to the validity of such an appointment when the fact of death was found incorrectly in the appointment. *D'Arusment v. Jones*, (4 Lea, 251). But it is obvious from that case that such fact was the only one the non-existence of which would render such appointment absolutely void.

To the same effect, as the question is now settled,—that the action of the County Court making the appointment is only voidable and not void,—are the cases of *Varnell v.*

Loague, (9 Lea, 158); and *Posey v. Eaton*, (id. 504); *Brown v. Brown*, (14 Lea, 253); *State v. Anderson*, (16 Lea, 321.)

There were three cases determined together in the last opinion. The facts of all are not given, but among the cases in which Anderson's appointment was held not void was one in which there was a will, naming an executor. No distinction was taken as to the validity or invalidity of Anderson's appointment as administrator on this account, because, though the question was made, the court held that none existed. Counsel cite other unreported cases to the same effect.

We think no question is better settled in this state and in the current of modern authority or upon sounder reason. Wills may frequently be made, and lie, as this, for years without discovery. The exercise of the jurisdiction of appointment of an administrator would be always unsafe and uncertain if the appointment was to be rendered void *ab initio* by the discovery of a will. The evils attendant upon such a rule are far greater than can possibly result from the contrary holding. It were better that rights thus acquired should be settled by the statute of limitations than that parties should never acquire any in cases of administration, or never be sure that those supposed to have been acquired were in fact so.

The old English rule to the contrary was in 1857 changed there by statute, — 20 and 21 Vict. c. 77, § 75, cited in 1 Williams, Ex'rs, (6th Amer. ed. pp. 619, 632, 639),—and so it is generally changed where it ever prevailed in the American states by effect of statutes making executors' power to depend on court appointment and qualification, —7 Amer. & Eng. Enc. Law, p. 113, and notes; (1 Williams, Ex'rs, 6th Amer. ed. top p. 347, and notes.)

The settlement made in 1877 was final in the sense of the statute, notwithstanding years after another claim due the estate, not therein included, was collected by the executor; and suit to recover balance due in that settlement could not be sustained after ten years. As neither bill in this cause

was filed within ten years of that date, no recovery can be had in that account. The money received in January, 1885, was within ten years of the filing of either bill, and recovery, therefore, can be had as to the \$1,890 due as John Armfield Franklin's proportion of that fund.

The complainant will therefore, as executor of John Armfield Franklin, recover this amount, with interest from the date it came to the hand of the defendant as executor of John Armfield. He will recover interest because there was nothing to prevent a payment of that fund at that time, as there was a party in existence capable of receiving it,—the representative of John Armfield Franklin's estate.

After it is received complainant, as legatee, has an interest, but what that interest is can only be ascertained after settlement of expenses of the estate incurred in litigation. It seems there are no debts or other charges against the estate. But it is obvious that large expenses have been incurred in establishing the will and prosecuting this cause it is only out of the net surplus that the legacy is to be settled. Of whatever this may be, complainant will be entitled to a life-estate, and defendant to a set-off as to this on account of his debts established as decreed by the chancellor.

The *corpus* of the fund remaining after settlement of expenses and charges indicated will, on the expiration of the life-estate of Ed. N. Franklin, belong to his surviving children, who take as a class under the will, the bequest being to a class of persons, subject to fluctuation by increase or diminution of its members in consequence of future births or deaths, and the time of payment or distribution of such fund being fixed at a subsequent period on the happening of a designated event, and the bequest being of an aggregate fund given to the children as a unit, and passing a joint interest. (*Frierson v. Van Buren*, 7 Yerg. 606; *Satterfield v. Mayes*, 11 Humph. 58; *Womack v. Smith*, id. 478; *Bridgewater v. Gordon*, 2 Sneed. 9.) The word "heirs," used in the will, is manifestly used in the sense of "children." The cause will be remanded for an account to as-

certain the amount, if any, which may be the subject of set-off in favor of defendant.

The costs of the cause accrued below will be paid two-thirds by defendant and one-third by complainant; that of this court will be equally divided between them, both having appealed and assigned errors. The amount charged to complainant may be paid out of the fund recovered to be administered.

It is essential to the validity of a grant of letters of administration that it shall be made to appear to the court that the decedent died intestate. *Bulkley v. Redmon*, 2 Bradf. (N. Y.) 281. Letters of administration granted on the representation of intestacy which is untrue are avoidable and will be revoked. *Broughton v. Bradley*, 84 Ala. 694; *Jennings v. Moses*, 88 Ala. 402; *Watson v. Glover*, 77 Ala. 328. If after the issue of letters of administration an instrument is established as a will, the letters will be revoked, but they are not declared void. *Watson v. Glover*, 77 Ala. 323; *Kittredge v. Folsom*, 8 N. H. 98; *Schluter v. Bowery Bank*, 117 N. Y. 125; 22 N. E. Rep. 572; *Bulkley v. Reimond*, *supra*. Letters of administration having been granted after a verdict against the will, on the reversal of the judgment the letters must be revoked but that does not affect estate in so far as it has been properly administered. *Patton's Appeal*, 81 Pa. St. 465.

As to future devises to children as a class, see note to *Mosby v. Paul's Adm'r*, *supra*.

WATERMAN vs. ALDEN.

[148 United States, 96.]

FORGIVING DEBTS.

A direction that any and all notes, bills, accounts, agreements or other evidences of indebtedness against any of the legatees, brothers and sisters of testator, held by testator at the time of his decease be canceled by the executors and delivered up to the makers thereof without payment of the same or any part thereof, except two notes given by one of the legatees and secured by a trust deed, does not apply to a joint and several note given after the date of the will, by a firm of which one of the brothers was a member, for money borrowed for partnership purposes.

APPEAL from the Circuit Court of the United States for the northern district of Illinois.

Wm. R. Plum, for appellant.

John P. Wilson, for appellees.

Mr. Justice GRAY delivered the opinion of the court.

This was a bill in equity by Robert W. Waterman, a citizen of California, against Philander M. Alden and George S. Robinson, citizens of Illinois, and executors of James S. Waterman, to recover back certain sums of money alleged to have been paid by mistake.

James S. Waterman, for twenty years before his death, lived and did business as a banker in Sycamore, Ill. He died on July 19, 1883, without children or descendants, and leaving an estate amply sufficient, without the sums claimed in this suit, to pay all debts, legacies and costs of administration.

By his last will, dated November 28, 1870, and admitted to probate September 18, 1883, he gave to his wife one-third of all his estate, real and personal; to other persons, certain specific legacies of comparatively small amount; and all the residue of his estate, real and personal, to trustees, in trust to pay the annual income for a term of twenty-one years to his six brothers and sisters (of whom the plaintiff was one), and at the end of that time to divide the principal in equal shares among them, and the issue of any one deceased; and further provided as follows:

“(7.) I desire and direct that any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my said brothers and sisters, held by me at the time of my decease, be canceled by my said executors, and delivered up to the maker or makers thereof, without payment of the same, or any part thereof, except two notes I hold against John C. Waterman,—one for eight thousand dollars, dated August 10, 1870, and due January 1, 1871; and one for four thousand six hundred dollars, dated No-

vember 28, 1870, and due six months after date,—and both secured by trust-deed upon lands in Johnson county, state of Missouri, which notes I desire and direct to be collected, and equally divided between my said brothers and sisters, the child or children of a deceased brother or sister to take the same share the father or mother would have taken if living.”

In accordance with the seventh clause of the will, the defendants delivered up to the plaintiff individual notes of his for from \$12,000 to \$15,000, and to John C. Waterman, another brother, his unsecured notes for about \$30,000.

The real question in the case is whether that clause of the will applies to notes given by the plaintiff and another person to the testator under the following circumstances:

In 1881 the plaintiff, residing in San Bernardino, Cal., formed a mining partnership with one Porter, under the name of Waterman & Porter, in which the plaintiff's interest was three-fourths and Porter's one-fourth. On May 14, 1881, the plaintiff signed and gave to the testator, as security for the payment of any advances that he might make to the partnership, an agreement in writing to execute to him, within twelve months from date, on demand, a conveyance of twenty-four undivided hundredths of certain mining property in California, the estimated value of which at that time was, as the plaintiff testified, \$1,000,000. The testator advanced to the partnership, for the development and working of the mines, between \$25,000 and \$30,000, part of which was repaid in his lifetime. At his death he held five notes of the partnership (which may be assumed to have been several as well as joint), signed by the partnership name, amounting in all to \$10,000, dated in the latter part of 1881, and payable in February or March, 1882, with interest at the rate of eight per cent. annually. The partnership afterwards sent to the defendants, in payment of these notes, with interest, and of other debts of the partnership to the testator, drafts of a bank in San Francisco upon a bank in Chicago for \$11,949.51, bought by the partner-

ship, Porter contributing his share; and the defendants thereupon canceled and returned these notes.

The plaintiff demanded of the defendants repayment of these sums, as having been paid in ignorance of the terms of the will, and under mistake of law and of fact. The defendants refused, because they were advised by counsel that by the will the only notes or evidences of indebtedness against the testator's brothers which were to be canceled and delivered up were simply personal debts.

This bill in equity was thereupon filed, and after a hearing before the chief justice on pleadings and proofs, was dismissed, and the plaintiff appealed to this court.

The matter to be ascertained in this case is the intention of the testator as manifested on the face of his will, by which, after making provision for his widow, and some inconsiderable legacies, he devises and bequeaths the bulk of his property to be distributed among his brothers and sisters in equal shares, and then, as incidental to his general scheme of distribution, directs "that any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my said brothers and sisters held by me at the time of my decease be canceled by my said executors, and delivered up to the maker or makers thereof, without payment of the same, or any part thereof," except two notes held by the testator against John C. Waterman alone, amounting to \$12,600, secured by trust-deeds upon lands in Missouri, which he directs to be collected and divided among his brothers and sisters.

The manifest object of the clause is to benefit brothers and sisters of the testator and them only. The testator clearly expresses his intention that (with the exception specified) any sums of money which may be owing by any of them to him at the time of his death shall not be collected, or be treated as part of his estate for the purpose of division among them, but that all notes, bills, accounts, agreements, or other evidences of such debts shall be canceled and delivered up. The terms of the exception may affirm or imply an intention to include in the general pro-

vision debts of a brother or of a sister for which he holds security; but they have no tendency to show that sums of money owing from any other person are intended to be released or given to such person, or to be excluded from the estate to be distributed among brothers and sisters.

Taking the words of the clause in connection with the general scheme of the will, it is impossible to attribute to the testator an intention to include joint and several notes made to him between the date of the will and his death, by a partnership of which one brother is a member, to obtain money to carry on the business of the partnership, and secured by an agreement to convey real estate. To hold that the brother alone was discharged from liability, while his partner remained liable to the estate, upon such notes, would be inconsistent with the positive direction that all notes coming within the scope of the clause shall be canceled by the executors, "and delivered up to the maker or makers thereof, without payment of the same, or any part thereof." To hold that there was a legacy of the whole of such notes to the brother, with a right to compel payment of a share thereof by his partner, would be equally inconsistent with that direction, and would, moreover, give to the brother alone, instead of to him together with the other brothers and sisters, the share of the debt for which the stranger was ultimately liable. To hold that such notes should be canceled and extinguished as against both makers the brother and his partner, would contravene the testator's manifest purpose to benefit brothers and sisters only; for to release the stranger from his share of the debt would not only confer no benefit upon the brother, but injure him in common with the other brothers and sisters by diminishing the estate to be divided among them.

The case is quite different from a legacy to a particular person of "his bond" for a sum named, which must, of course, pass a joint bond, when there is no other, as in the cases, cited by the appellant, of *Maitland v. Adair*, (3 Ves. 231), and *Izon v. Butler*, (2 Price, 34.)

The decisions upon contracts to secure debts of a par-

ticular person are, to say the least, not inconsistent with this conclusion. A contract of guaranty or suretyship, by which one person undertakes to be responsible for debts to be contracted by another, does not ordinarily include debts contracted by the latter jointly with a third person, as partners or otherwise. (*Bellairs v. Ebsworth*, 3 Camp. 52; *Assurance Co. v. Bold*, 6 Q. B. 514; *Montefiore v. Lloyd*, 15 C. B. [N. S.] 203; *Leathley v. Spyer*, L. R. 5 C. P. 595, 602; *Palmer v. Bagg*, 56 N. Y. 523; *Sewing Machine Co. v. Delano*, 113 Mass. 194, 197; *Sewing Machine Co. v. Hines*, 61 Mich. 423; 28 N. W. Rep. 157.) Even when a man gives security for debts which he may himself contract, opinions have differed upon the question whether it does or does not include debts contracted by him, as a member of a partnership. (*Ex parte Freen*, 2 Glyn & J. 246; *Chuck v. Freen*, Moody & M. 259; *Ex parte McKenna*, 3 De Gex, F. & J. 629; *Bank v. Thompson*, 121 N. Y. 280; 24 N. E. Rep. 473; *Hallowell v. Bank*, 154 Mass. 359; 28 N. E. Rep. 281.)

For these reasons we concur in the opinion delivered by the chief justice in the Circuit Court that the seventh clause of the will, whether operating by way of release or by way of legacy, cannot be construed as including the joint and several notes of Waterman & Porter, or any part thereof. Decree affirmed.

A bequest to the executor of all debts, dues, and demands of name, nature or kind soever held against him and his wife, was held not to pass a bond and mortgage executed by the wife, on which \$1,200 was still due, the premises affected by the mortgage having in the meantime conveyed by her to another, the entire estate being worth only about \$7,000, the testatrix having left a child, her bequests to relatives being insignificant, and the executor being indebted to her at the time of her death in the sum of seventy-five cents, while his wife owed \$225 exclusive of the bond. *Matter of Lee*, 65 Hun, 524; 20 N. Y. Supp. 598.

IN MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNTS OF J. MOREAU SMITH *et al.*, AS EXECUTORS.

[181 New York, 239.]

TRUST—CONTINUANCE—SURVIVORSHIP AND REPRESENTATION.

Under a devise in trust to invest and from the proceeds to pay a certain sum monthly to testator's son, for his support and that of his daughter during her minority, with a provision that on the death of the son, the daughter should, if she survived him, have one half of the principal, the other half to go to testator's heirs-at-law, the trust continues as long as the son lives though he survives his daughter.

Under a bequest of a sum of money to each of testator's grandchildren to be paid to them on their severally attaining a certain age, with a direction for the distribution among the surviving grandchildren of the share of one dying before attaining that age, grandchildren born after testator's death are not entitled to share in the legacy to a grandchild so dying.

APPEAL from a judgment of the General Term of the Supreme Court in the fifth judicial department affirming the decree of the surrogate of Monroe county, settling the accounts of J. Moreau Smith and Emma Herrick as executors of the last will and testament of Lewis R. Herrick, deceased.

The fourth and fifth clauses of the will are as follows: "Fourth. I give and bequeath to each of my grandchildren the sum of ten thousand dollars, to be paid to them on their severally attaining the age of twenty-five (25) years, I direct that during the minority of any of such grandchildren and until they shall respectively attain the age of twenty-five years the said sum shall be invested by my executors in bonds and mortgages or other safe securities, and the interest and proceeds arising therefrom shall be paid semi-annually to the respective mothers of said children, and in the event of the decease of any mother the said interest shall be added to the principal fund, which, with all accumulations, shall be paid to each of said grandchildren as above mentioned. In the event of the decease of either of said grandchildren prior to attaining the age of twenty-five years, then I direct that the share of such de-

ceased shall be equally divided between the surviving grandchildren share and share alike. All the grandchildren, as a class, shall take irrespective of relationship as a brother or sister of a deceased child. With respect to my grand daughter, Emma Dude, daughter of my son Richard P. Herrick, I direct that the interest arising from the investment of her ten thousand dollars instead of being paid to her mother shall be added to the one-third part of my estate hereinafter devised and bequeathed to her said father."

"Fifth. After satisfying the foregoing provisions, I direct that all the rest, residue and remainder of my estate, *both real and personal*, be divided into three (3) equal portions, and I give, devise and bequeath one such third part to Helen E. Smith, wife of J. Moreau Smith, one other third part to Emma C. Morse, wife of Rollin E. Morse, *and the remaining one-third part I direct shall be held in trust by my executors* upon trust to invest the same upon such securities as hereinbefore mentioned, and out of the proceeds arising therefrom to pay to my said son, Richard P. Herrick, the sum of one hundred dollars per month for his support and maintenance, *and for the support, maintenance and education of his daughter, Emma Dude Herrick, during her minority*, provided and upon the sole condition that after she attains the age of eight (8) years, *she shall return to the residence at that time of my wife or her relatives*, residing within the state of New York, it being anticipated that her father may return and reside with her, *but this clause shall be operative only* in the event that my said grandchild shall be able to, and shall actually reside with her said relatives, either alone, or with her father as the case may be, and shall be governed by their tuition, advice and directions, or by the advice and counsel of my executors, or a majority of them, *until she attain the age of twenty-five (25) years. In case my said grand daughter shall neglect or refuse to reside with her said relatives during said intermediate period eight and twenty-five years of age, then all the provisions in this will contained relating to my said grandchild, shall, during such period*

of refusal, be deemed wholly inoperative and void, and shall be construed as if no clause or recognition were had of my said grandchild. In the event of my said grand daughter surviving her father, Richard P. Herrick, then she shall receive one-half of his one-third part of the residue of my estate hereinbefore given and devised to him on her arriving at twenty-one years of age, and the remaining moiety of his said one-third part shall be equally divided between my heirs-at-law, that is, to my said daughters or their several children as a class, in the event of the decease of either of my daughters then surviving, share and share alike.

“In no event shall my said son Richard P. be vested with, receive or control any part of the principal of the said one-third, but the same shall be held as a trust-estate only, and the income only paid to him. If from sickness or any other unavoidable necessity, the above-mentioned provision shall not be sufficient for the support and maintenance of my said son Richard P. and his daughter Emma Dude, then I direct my executors, or a majority of them, to apply such part of the accumulated interest or of the principal fund, constituting such one-third part of the residue of my estate, as shall, in the judgment of my executors, or a majority of them, be necessary to supply the deficiency. In the event of the decease of my said son Richard P., leaving no issue surviving him, then I direct that the said one-third part hereinbefore given and devised, in trust for him, shall revert to my heirs-at-law, then surviving, and be equally divided between them share and share alike. This provision shall not be construed as vesting any estate in my said son Richard P. Herrick, and the words heirs-at-law shall include my grandchildren then surviving as a class.”

Richard P. Herrick and his two infant grandchildren, the children of Emma Dude Herrick, appeal.

W. A. Sutherland and Arthur E. Sutherland, for appellants.

David Hays and William W. Webb, for respondents.

ANDREWS, J.—We find no basis for the claim that the trust created by the fifth clause of the will terminated at the death of Emma Dude Herrick, the daughter of the testator's son Richard. It is true that the duration of the trust is not expressly declared. But it was created primarily for the benefit of the testator's son, Richard; and the inference that it was to continue during his life is plain. The benefit of the daughter was incidental and subordinate to the main purpose of the testator. The income from the trust-estate was to be paid to Richard in monthly payments and it was left to him to apply it to the support of himself and his daughter during her minority, and the condition annexed to her right to support and maintenance was apparently inserted as a means of securing a compliance by the granddaughter with the testator's wish that she should reside with the relatives designated. The death of the father is the event upon which the trust by necessary implication is limited, and the gift over is upon that event alone. The gift over on the contingency of the death of Richard leaving no issue surviving is preceded by the clause: "In no event shall my son, Richard P., be vested with, receive, or control any part of the principal of the said one-third, but the same shall be held as a trust-estate only, and the income only paid to him." These two provisions seem to be conclusive that the trust was to continue during Richard's life. The rule that the gift of the income of property is a gift of the property itself only applies when there is no limitation of time attached to the gift. A gift of income, followed by a gift over of the *corpus* on the happening of a contingency, or on the death of the beneficiary, by necessary construction, and without express words, is a gift of the income for the intermediate period only.

The other question of construction relates to the claim of the two children of Richard P. Herrick by his second wife to share in the legacy of \$10,000 given to their half-sister, Emma Dude Herrick, by the fourth clause of the will. The claim of the appellants on this branch of the case is based on

the general rule which has been declared in many cases, that, where a legacy is given to a class of persons, distributable at a time subsequent to the death of the testator, all persons in being at the time appointed for the distribution who answer the description, whether born before or after the death of the testator, are deemed to be objects of the gift, and are entitled to share. (*Teed v. Morton*, 60 N. Y. 506, and cases cited). This construction is placed on the presumed intention of the testator. In the case which most frequently occurs,—of a legacy to A. for life, and after his death to the children of A.,—this presumption is founded upon strong probability, since in such a case the immediate object of the testator's beneficence is A., and it is natural to suppose that the children of A. were made ultimate beneficiaries by reason of their relationship to A., and all bearing that relation when the fund is distributable would be within the motive. The rule applies whether the legacy (if future) is vested or contingent. In the one case, those of the class existing at the death of the testator take a vested interest, subject to open and let in persons of the class subsequently born, and living at the time appointed for the division; in the other, the happening of the event determines both the vesting and the persons entitled to take. (See *Tucker v. Bishop*, 16 N. Y. 402.) But it is obvious that a testator may devote his gift to a whole class, or restrict it to certain individuals of a class, to persons of a class living at his death, or to such persons and all others who may belong to the class at the period of distribution. It is a question of intention, and where the question arises judicially it is to be determined by the intention declared by the will and the *res gestæ*.

We think the intention in the will in question, to include grandchildren not born at the testator's death in the benefit of the legacies which fall by the death of any grandchild before the age of twenty-five, is negatived on the face of the will. The testator made no direct provision for unborn grandchildren. He gave to each of his living grandchildren a legacy of \$10,000. He says, "to each of my grandchildren,"

and admittedly only living grandchildren take a primary legacy. The construction of these words is the same as if the testator had named each of the six grandchildren in place of using the words, "each of my grandchildren." The contention is that the meaning of the word "grandchildren," used in the direct bequest, is enlarged when the testator in the same clause provides for the devolution of the share of any grandchild dying before attaining the age of twenty-five years. The language of the provision is: "In the event of the decease of either of said grandchildren prior to attaining the age of twenty-five years, I direct the share of such deceased shall be equally divided between the surviving grandchildren, share and share alike." The natural meaning and reading refers the words "surviving grandchildren" in this sentence to the survivors of the grandchildren previously designated. It would wrench the manifest sense of the clause to give it any other interpretation. There is no doubt that the word "survivors" refers to a survivorship at the death of the grandchild, and not at the death of the testator. But what survivors? is the question to be determined. The answer plainly is survivors of the six legatees, all of whom were of the same degree of relationship with the testator, and constituted a class although not all the individuals who at some time were grandchildren of the testator. Reference to a paragraph in the fifth clause of the will shows with great distinctness that the testator in framing his will either did not have grandchildren who might be born after his death in mind, or that he did not intend to provide for them. In the gift over of the trust fund in the event of the death of Richard before the death of his daughter, Emma, he gives one moiety to Emma and the other moiety to the testator's daughters, making no provision whatever for any children Richard might have who should be born after the testator's death. Richard was then a young man, and his remarriage was probable, and did in fact occur. This omission is quite significant that the testator did not intend in the gift over of Emma's legacy on her death before twenty-five, that brothers or sisters

who might be born after his death should share in the distribution. We think the judgments below on this point follow the natural and reasonable interpretation of the will, and that the two children of Richard, born after the testator's death, are not entitled to any share of the legacy given to their half-sister, Emma. There are some other questions which arose on the accounting. They are fully considered in the opinion of the surrogate, and, we think, were correctly decided. We discover no error in the judgment, and it should therefore be affirmed.

All concur, except EARL, C. J., and PECKHAM, J., not voting, and MAYNARD, J., absent.

McCLANAHAN *et al.* vs. McCLANAHAN *et al.*

[36 West Virginia, 34.]

ADVANCEMENTS — PRESUMPTION.

A conveyance from a father to a child for a very inadequate consideration and the further consideration of natural love and affection is presumptively an advancement.

Whether or not the transfer of property from a father to a child is an advancement depends on the intention of the father.

This intention is to be inferred from evidence of the surrounding circumstances such as the value of his entire estate and the number of his children.

APPEAL from Circuit Court, Kanawha county.

Bill for partition.

***J. W. Kennedy*, for appellants.**

***Jackson & Knight* for appellees.**

ENGLISH, J.—John R. McClanahan, who was a resident of Kanawha county, was married twice, and died in the

year 1887, leaving issue, as the result of both marriages, and his second wife, surviving him. The children by the first marriage were Elizabeth Bailey, Sallie Looney, Rachel Derrick, John W. McClanahan, and Samuel and James P. McClanahan. The last two named died before their father; said Samuel leaving two children, and James P. leaving six children. The children of said second marriage were C. H. McClanahan, and Richard, Robert, and Jarrett McClanahan. Said John R. McClanahan, in his life-time, accumulated a considerable amount of property, real and personal, and as early as October 17, 1877, he commenced making conveyances of portions of his real estate to some of his children by his first marriage, and on that day he conveyed to said Elizabeth Bailey, in consideration of one dollar and love and affection, about seventy-two acres of his land, which was worth \$955.50, reserving the use thereof during the life of the grantor. On the 9th day of November, 1877, he conveyed to said John W. McClanahan, in consideration of \$300 and love and affection 157½ acres of his land, which was worth \$1,625; also reserving the use thereof during the life of said grantor. He also gave to said Sallie Looney the sum of \$700 in cash; and on the 28th day of November, 1879, he conveyed to said James P. McClanahan and his six sons 160 acres of land in consideration of one dollar and love and affection, which land was worth \$1,900. He also gave to Rachel Derrick \$300 in money, and to C. H. McClanahan a note for \$200, made by W. E. Kellar, which said C. H. McClanahan claims to be worthless. Said John R. McClanahan also died seised and possessed of forty acres of bottom land, valued at \$1,000; 115 acres of hill land, valued at \$805; and 400 acres of hill land, valued at \$2,000.

In the month of February, 1888, said C. H. McClanahan, and Richard McClanahan, Robert McClanahan and Jarrett McClanahan, children of said John R. McClanahan, by said second marriage, filed their bill in the Circuit Court of Kanawha county against Jane McClanahan, widow of said John R. McClanahan, and the other heirs-at-law of

said John R. McClanahan, in which they set forth the facts above stated in reference to the conveyances made by said John R. McClanahan in his life-time to said Elizabeth Bailey, John W. McClanahan, James P. McClanahan, and his six sons; also as to the amounts of money advanced to the said Sallie Looney and Rachel Derrick, and the note on W. E. Kellar for \$200, which was given to him by said John R. McClanahan, alleging that said conveyances and gifts were made by way of advancement, and also alleging that the lands of said John R. McClanahan which he had not advanced to his children, and which he still owned, embraced about 600 acres, and that the plaintiffs were entitled to and desired a partition; and they further alleged that there was no personal estate for distribution; that the said C. H. McClanahan desired to throw the said Kellar note so advanced to him into hotchpot, and return the same to the estate, and for that purpose filed the same with his bill, subject to the disposal of the court. They prayed that partition might be made of the lands of which the said John R. McClanahan died seised and possessed, and that the children and grandchildren of said John R. McClanahan, to whom advancement had been made as thereinbefore stated by said John R. McClanahan in his life-time, should not be allowed to come into partition, and receive any part of the lands then remaining to be divided, unless they should first bring said advancements into hotchpot, to be also divided among the heirs of the said John R. McClanahan; and for all such other relief as they might be entitled to.

The infant defendants filed a formal answer by guardian *ad litem*, and the adult defendants also answered said bill, denying that any of said tracts of land were conveyed by John R. McClanahan to them, or either of them, by way of advancement, and claiming that a good, valid, and adequate consideration was paid for said lands, notwithstanding the recitals in said deeds of love and affection, etc. They deny that \$750 was advanced to said Sallie Looney, but admit that \$700 were given her by said John R. Mc-

Clanahan. They also deny that the \$300 received by Rachel Derrick was so received by way of advancement, but alleged that a full, adequate, and valid consideration was given said John R. McClanahan for the same, pursuant to contract, and not by way of advancement; and they deny that any conveyances made or money paid to them by said John R. McClanahan were advancements to them, respectively, or that they were so intended, but allege that said McClanahan received full, adequate, and valid consideration for the same; and they deny that the same are entitled to be brought into the division of said estate, except as to said Sallie Looney. They also allege that the plaintiffs have been using, occupying, and cultivating said lands since the death of said John R. McClanahan, and have failed to pay the taxes thereon, or account to the defendants for their share of the rents and profits arising therefrom; and they pray that the said plaintiffs be compelled to account for the rents, issues, and profits arising from said real estate since the same has been in their possession; that a receiver may be appointed to take charge of the crops grown on said real estate, and to pay off said taxes due on said real estate, and to hold the same, rent it out, and pay all the taxes charged on said property, pending said suit, and for general relief.

On the 27th day of June, 1888, a decree was entered in said cause referring the same to a commissioner to make a report showing the advances, if any, made by said John R. McClanahan to each of his children, when and how the same were made, and the amount and value thereof made to each child, and the amount with which each child should be charged at the date of making said report, or account of such advances, etc. Quite a number of depositions were taken before said commissioner, and on the 6th day of July, 1889, said commissioner closed his report, filing, however, a supplement to said report on the 9th day of July, 1889. Said commissioner in his report found that an advancement of \$700 was made in money by said John R. McClanahan to Mrs. Sallie Looney in 1877 or 1878; that the

tract of land, containing about seventy-two acres, which was conveyed by said decedent to Elizabeth Bailey, was worth \$955, and was an advancement to her; that John A. McClanahan and Rebecca McClanahan, who are infant children of Samuel McClanahan, are entitled to the share their father would have received had he survived said John R. McClanahan; that the 160 acres conveyed to James P. McClanahan and his six sons, of the value of \$1,900, was also an advancement; also that \$300 received by Rachel Derrick from her father was so received by way of advancement, and that the tract of 157 acres which was conveyed by said John R. McClanahan to John W. McClanahan was an advancement to him, less \$300, and that the value of said advancement was \$1,325.

This report was excepted to by counsel for the defendants (1) because it reports that the conveyance to Elizabeth Bailey from John R. McClanahan, deceased, was an advancement, and that she paid no consideration therefor; (2) because it reports that the conveyance to John W. McClanahan was by way of advancement, and that he paid only \$250 therefor; (3) because it reports that the \$300 paid to Derrick was an advancement; (4) because it attempts to fix the value of the property received by said defendants as of the date of their receipt, and not upon the contract of conveyance; (5) because of all interest he has charged on said land conveyed or money received; (6) because of all charges made in said report against said defendants on account of the land conveyed and money received by them from said John R. McClanahan, deceased; and Rachel Derrick, J. W. McClanahan, and Elizabeth Bailey, defendants, further excepted to said report because of the advancements reported therein against them.

On the 8th day of April, 1890, said cause was heard upon the bill, answers, replications thereto, and upon said commissioner's report, and the depositions of witnesses taken before said commissioner accompanying said report, and upon the supplemental report of said commissioner, and upon the injunction awarded in said cause upon the peti-

tion of J. W. McClanahan, upon consideration whereof it was adjudged and decreed that said report of Commissioner Gallaher, as modified by said supplemental report, be, and the same was thereby, approved and confirmed; and, the said C. H. McClanahan electing to bring into hotchpot the note of W. E. Kellar for \$200, advanced to him by his father, John R. McClanahan, deceased; and the said Rachel Derrick electing to bring into hotchpot the said sum of \$300, which said commissioner reported as advanced to her; and the said John W. McClanahan, Sallie Looney, Elizabeth Bailey, and the children of James P. McClanahan not electing to bring into hotchpot the several advancements made to them respectively,—it was decreed that the real estate of which said John R. McClanahan died seised and possessed be divided between the plaintiffs to said suit and the two heirs of Samuel McClanahan, deceased, and Rachel Derrick, to whom no advancements have been made, except to the said C. H. McClanahan and Rachel Derrick, who have elected to bring their advancements into hotchpot, as aforesaid; and commissioners were appointed to divide said land, as above indicated, according to quantity and quality, the lot to be laid off to said Rachel Derrick to be of less value than either of the others by \$300, unless she should elect before said partition was made to repay to said estate said sum of \$300, then a lot of equal value with those assigned to the others, respectively, was to be allotted to her.

From this decree J. W. McClanahan, Rachel Derrick, S. W. Derrick, Elizabeth Bailey, and Bushrod Bailey obtained this appeal.

The first error assigned and relied upon by the appellants is that the court erred in overruling each and all the exceptions of defendants to Commissioner Gallaher's report. These exceptions were six in number, and, in order to determine the propriety of the action of the court with reference thereto, nearly the entire testimony taken before said commissioner would have to be analyzed, and to some extent the credibility of the witnesses passed upon.

The first exception to said commissioner's report is: "Because he reports that the conveyance to Elizabeth Bailey from John R. McClanahan, deceased, was an advancement, and that she paid no consideration therefor." Said Elizabeth Bailey states in her deposition that she paid \$350 for the land to her father—that she paid \$100 down and \$250 in one year; and when asked what said land was worth, answered it was worth \$10 per acre. Her deed calls for seventy-nine and one-half acres, and recites that it is made in consideration of \$1 and the "love and affection which the party of the first part doth have to the party of the second part;" and on the face of the deed said grantor reserved the use of the premises during his natural life; and the said Elizabeth Bailey, when asked, "What, if anything, was said by said John R. McClanahan at the time of your purchase of your real estate of him, or at any other time, as to how he intended that transaction?" answered: "It seems as if it were a sale. I asked him about the payment, and he said it was \$10 per acre." According, then, to her own testimony, she paid \$350 for a tract of land valued by the grantor at \$795, and, instead of stating the true consideration on the face of the deed, allowed the grantor to insert \$1 and love and affection as the consideration, when it was to her interest, if she paid anything for said land, to have the true consideration recited on the face of the deed; and, although she states that \$250 of the money she paid for said land was furnished by her husband, he was not examined as a witness in support of her testimony.

And again, the fact that the grantor on the face of the deed recites that the deed was made in consideration of love and affection should have great weight in establishing the fact that said conveyance was an advancement to Elizabeth Bailey, and not a sale; and again, the grantees in said deed were estopped by the recitals in the deed under which they claim, and, after they had accepted their deeds from said John R. McClanahan, will not be allowed to contradict such recitals. (See 2 Herm. Estop. pp. 749, 750.)

The next exception to said report is: "Because it reports that the conveyance to John W. McClanahan was by way of advancement, and that he only paid \$250 therefor." This deed recites on its face a consideration of \$300 and love and affection, but when placed on the witness stand said John W. McClanahan swears that he paid his father \$1,400 in cash for it, or, rather, subject to his orders; that by his order he paid Mrs. Looney \$500, and the balance he paid to him in installments, and his father had his notes for \$450, and he paid those notes. The balance he paid in cash; sometimes twenty dollars and sometimes he would pay him as much as \$100.

It appears that John W. McClanahan had in June, 1871, contracted to purchase the prospective interest of his sister Mrs. Looney in said 286 acres of land for the sum of \$715, and he states in his deposition that he paid something near \$500, and the balance he paid to his father. When this was paid does not appear. His attention was called to the fact that the consideration recited in the deed to him from his father was \$300 and love and affection, and was asked to explain why the deed was so written, and replied: "I owed my father, the day the deed was written, \$300. That is all the reason I can see why it was drawn in that way." He, however, states that he paid \$1,400, or somewhere near that, for said tract of land, although he claims it was not worth more than \$1,000 or \$1,200; and he only produces two notes that he had taken up from his father, one for \$100 and the other for \$250. It must be regarded somewhat remarkable that he would pay \$1,400 for a tract of land which he says was only worth \$1,000, or at most \$1,200, subject to the incumbrance of his stepmother's dower, and subject also to the life-estate of his father. We are led to the conclusion from the circumstances disclosed by the evidence that said commissioner was warranted in finding that the amount of his advancement was \$1,625, less \$300 cash paid by him.

As to the \$300 paid Mrs. Derrick by John R. McClanahan, the commissioner finds that to have been an advance-

ment. It appears that Rachel Derrick and her husband moved on a tract of land belonging to John R. McClanahan, and lived there (how long does not appear) without paying rent, building thereon a small house and some fence, and doing some grubbing; and he states that when he moved from said tract of land he received said \$300 from John R. McClanahan as a gift, and we think the commissioner properly concluded that it was intended by said John R. McClanahan as a gift by way of advancement to his daughter Rachel Derrick.

The fourth and fifth exceptions to said commissioner's report were as follows: "(4) Because he attempts to fix the value of the property received by said defendants as of the date of their receipt, and not upon the contract of conveyance. (5) Because of all interest he has charged on said land conveyed or money received."

The rule in regard to this matter has been laid down by this court in the case of *Kyle v. Conrad* (25W. Va. 760,) (section 1 of syllabus,) where it is held that, "if a father dies, having advanced to some of his children, by conveying to them real estate, and giving to them personal property by way of advancement, when his estate is divided and distributed his children to whom such advancements have been made should be charged, when their advancements are brought into hotchpot, with the value of the property advanced when received, but not with the rents and profits of the land conveyed to them severally, nor with the increase of the personal properties, nor with the interest on the value received of either the real or personal property during the life-time of the father; but they must be charged with interest from the death of the father on the value, when received, of all property, real or personal, so advanced." Said commissioner, in his supplemental statement, which was confirmed by the court, has calculated the interest in accordance with this decision.

Now, while it is true that there is some conflict in the testimony upon which the report of said commissioner was based, and he was compelled to grope among the circum-

stances detailed in order to ascertain the true intention of said John R. McClanahan in making the gifts and conveyances which are disclosed by the record to have been made, yet circumstantial evidence may be looked into in determining such intention. The presumption is that the parent intends that his children shall share equally in his property, and the amount of the estate and number of the children, as a matter of course, must have weight in considering whether such distribution has been made.

Again, the evidence of advancement need not be conclusive, but a preponderance of testimony is sufficient. Bouvier, in his Law Dictionary, defines "advancement" as follows: "A gift by anticipation from a parent to a child of the whole or a part of what it is supposed such child will inherit on the death of the parent." And in *Lawson's Appeal* (23 Pa. St. 85), it was held that "advancement is a question of intention; that which was a gift at first cannot subsequently become an advancement."

In the case of *Watkins v. Young* (31 Grat. 84), the Court of Appeals of Virginia held that, "if a gift, unexplained, in the life-time of a father, who dies intestate, to one of his children, is to be presumed in law to be an advancement, this presumption may be repelled by evidence;" and CHRISTIAN, J., in delivering the opinion of the court (page 88), says: "In some of the states it is held that a gift of any considerable amount is *prima facie* an advancement, and is to be treated, in case the party to whom the advancement was made comes in for a distributive share, as a debt due from him to the estate;" citing *Grattan v. Grattan* (18 Ill. 170); *Jackson v. Matsdorf* (11 Johns. 91); *Bemis v. Stearns* (16 Mass. 200.) "In other states it has been held that the mere gift, unexplained, by father to child, does not make even a *prima facie* case in favor of an advancement, but that there must be evidence of intention to treat it as an advancement beyond the unexplained act. The mere gift furnishes no *prima facie* case of an intention to constitute an advancement;" citing *Johnson v. Belden* (20 Conn. 322); *Hatch v. Straight* (3 Conn. 31); *Bulkley v. No-*

ble (2 Pick. 337); *Partridge v. Havens* (10 Paige, 618.) And he continues: "But, whatever conflict may seem to exist on this question, all the cases agree that a gift in the life-time of the intestate, unexplained, is only a presumption in favor of an advancement, and makes only a *prima facie* case, which with the legal presumption may be rebutted by evidence."

In the case of *Hatch v. Straight, supra*, the court held that "a deed from a parent to a child in consideration of love and affection is presumed to be an advancement. Though this presumption may be rebutted, yet in a deed of lands from a father to his son in consideration of love and affection the further consideration of five dollars will not be sufficient to rebut the presumption." And it was also held in said case that "the declarations of a grantor subsequent to the delivery of the deed are not admissible to rebut the presumption that such deed operated as an advancement."

In *Kingsbury's Appeal* (44 Pa. St. 460), it was held that "where, in a deed of land by a father to his son, the consideration expressed was natural love and affection, and a bond for support during life, after the death of the grantor, on distribution of his estate, oral testimony is admissible to explain the attending circumstances of the conveyance, and that it was intended in part as an advancement."

The question, then, as to whether these transfers of property from John R. McClanahan to certain ones of his children were so conveyed and transferred by way of advancement depends upon the evidence and the surrounding circumstances. The solution of this question was referred to a commissioner, before whom the witnesses appeared and gave their testimony, and he had an opportunity of witnessing their demeanor, and judging of their credibility; and where the determination of a fact is referred to a commissioner, and depends mainly upon the weight of the evidence, which is conflicting, and the finding of the commissioner is confirmed by the Circuit Court, this court will not reverse the action of the Circuit Court therein, unless the

evidence before the commissioner was clearly insufficient, in any reasonable view, to support the finding of said commissioner.

So in the case of *Broderick v. Broderick* (28 W. Va. 379), (section 4 of the syllabus), this court held that, where a cause has been referred to a commissioner to ascertain and report the debts due from a decedent, and he returns with his report, as part thereof, all the evidence which was before him on which he acted, and the report is excepted to as unsupported by the evidence, and the Circuit Court has overruled said exceptions and confirmed the report, the appellate court will review the evidence, but, unless the same is clearly insufficient, in any reasonable view of it, to support the findings of the commissioner, will affirm the decree of the Circuit Court confirming such report. See, also, *Smith v. Yoke* (27 W. Va. 639).

The Circuit Court, in the case at bar, in the decree complained of has overruled the exceptions to the commissioner's report, and confirmed his action in finding as hereinbefore stated, and, under the rulings of this court in the cases we have cited, we do not think that this court would be warranted in reversing the decree complained of. Said decree must therefore be affirmed, with costs and damages to the appellees.

The rules of law declared by the court in the principal case have been reaffirmed by it in *Roberts v. Coleman*, 37 W. Va. 143; 16 S. E. Rep. 492.

Ordinarily the doctrine of intestacy applies only to cases of intestacy. *Grattan v. Grattan*, 18 Ill. 167, 170; *Arthur v. Arthur*, 10 Barb. (N. Y.) 24; *Hawley v. James*, 5 Paige, 318, 450; *Lawrence v. Mitchell*, 8 Jones (N. C.), 190; *Manning v. Manning*, 12 Rich. Eq. (S. C.) 428; *Hughes v. Kirkpatrick*, 37 S. C. 161; 15 S. E. Rep. 912; *Lanham v. Lanham*, 38 S. C. 129; 16 S. E. Rep. 609.

An advancement is the giving by an ancestor to a descendant, by way of anticipation, all or a part of that to which it is supposed to descendant will be entitled on the death of ancestor. *Grattan v. Grattan*, 18 Ill. 167, 170; *Wallace v. Reddick*, 119 Ill. 151; 8 N. E. Rep. 801; *Dillman v. Cox*, 23 Ind. 440; *Ruch v. Biery*, 110 Ind. 444; 11 N. E. Rep. 312; *Herkimer v. McGregor*, 126 Ind. 444; 25 N. E. Rep. 145; *Culp v. Wilson*, 133 Ind. 294; 132 N. E. Rep. 928; *McMahill v. McMahlill*, 69 Iowa, 115; 28 N. W. Rep. 470; *Brook v. Latimer*, 44 Kan. 431; 24 Pac. Rep. 946; *Clark v. Willson*, 27 Md. 693; *Harley v. Harley*,

57 Md. 340; Osgood v. Breed's Heirs, 17 Mass. 356; Fellows v. Little, 46 N. H. 27; Hattersley v. Bissett, 50 N. J. Eq. 574, 584; 25 Atl. Rep. 332; aff'd, 51 N. J. Eq. 597; 29 Atl. Rep. 187; Bruce v. Griscome, 9 Hun (N. Y.), 280, 282; Alexander v. Alexander, 41 Hun (N. Y.), 624, (Mem.); 1 N. Y. St. Rep. 501; Re Bartlett, 4 Misc. 380; 25 N. Y. Supp. 990; Hollister v. Attmore, 5 Jones (N. C.), 373; Lawson's Appeal, 23 Penn. St. 85; Miller's Appeal, 31 Penn. St. 27; Merkel's Appeal, 89 Penn. St. 340; Frey v. Heydt, 116 Penn. St. 601; 11 Atl. Rep. 535; Law v. Smith, 2 R. I. 244, 251; Rickenbacker v. Zimmerman, 13 Rich Eq. (S. C.) 114; Cawthorn v. Coppedge, 1 Swan. (Tenn.), 487; Vaden v. Hance, 1 Head. (Tenn.) 300; Morris v. Morris, 9 Heisk. (Tenn.) 814, 817; House v. Woodard, 5 Cold. (Tenn.) 196, 200; Cazassa v. Cazassa, 92 Tenn. 573; 22 S. W. Rep. 560; but it is none the less a present and complete gift of the property, Grattan v. Grattan, *supra*; Brook v. Latimer, *supra*; Harley v. Harley, *supra*; Beebe v. Estbrook, 11 Hun (N. Y.), 523; Re Bartlett, *supra*; Miller's Appeal, *supra*; Merkel's Appeal, *supra*; Pott's Appeal (Pa.), 10 Atl. Rep. 887; Yancy v. Yancy, 5 Heisk. (Tenn.), 353, 357; by which the donor divests himself of all interest in it or control over it. Joyce v. Hamilton, 111 Ind. 163; 12 N. E. Rep. 294; Herkimer v. McGregor, *supra*; Harley v. Harley, *supra*; Crosby v. Covington, 24 Miss. 619; Fellows v. Little, 46 N. H. 27, 35; Batton v. Allen, 5 N. J. Eq. 99, 103; Re Bartlett, *supra*; Smith v. Smith, 5 Vesey, 721; and is inconsistent with the creation of a debt to the donor. Osgood v. Breed's Heirs, 17 Mass. 356; Harley v. Harley, *supra*; Crosby v. Covington, *supra*; Fellows v. Little, *supra*, 35; Batton v. Allen, *supra*; Dawson v. Macknet, 42 N. J. Eq. 633; 8 Atl. Rep. 312; Chase v. Ewin, 51 Barb. 597, 613; Pott's Appeal, *supra*.

Small inconsiderable sums of money occasionally given to a child are however not to be regarded as advancements. Mitchell v. Mitchell, 8 Ala. 414; Holliday v. Wingfield, 59 Ga. 206; Sanford v. Sanford, 61 Barb. 298; 5 Lans. 486; Bruce v. Griscome, 9 Hun, 280, 281; nor are gifts or contributions made by a father to his child for the purpose of pleasure only. McCaw v. Blewitt, 2 McC. Ch. (S. C.) 90, 103; Ison v. Ison, 5 Rich Eq. (S. C.) 15, 19.

The intention of the parent at the time of the transaction determines its character. Meeker v. Meeker, 16 Conn. 333; Wallace v. Reddick, 119 Ill. 151; 8 N. E. Rep. 101; Dillman v. Cox, 23 Ind. 440; Woolery v. Woolery, 29 Ind. 249; Ruch v. Biery, 110 Ind. 444; 11 N. E. Rep. 312; Herkimer v. McGregor, 126 Ind. 247, 256; 25 N. E. Rep. 145; Brook v. Latimer, 44 Kan. 431; 24 Pac. Rep. 946; Parks v. Parks, 19 Md. 323, 331; Dilley v. Love, 67 Md. 603; Power v. Power's Estate, 91 Mich. 587, 589; 52 N. W. Rep. 80; Hall v. Hall, 107 Mo. 101; 17 S. W. Rep. 811; Hattersley v. Bissett, 50 N. J. Eq. 574, 585; 25 Atl. Rep. 332; Proseus v. McIntyre, 5 Barb. (N. Y.) 424; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91; Re Morgan, 104 N. Y. 74; 9 N. E. Rep. 861; Alexander v. Alexander, 41 Hun (N. Y.), 642, (Mem.); 1 N. Y. St. Rep. 501; Parker v. Newitt, 18 Or. 274; 23 Pac. Rep. 246; Lawson's Appeal, 23 Pa. St. 85; Frey v. Heydt, 116 Pa. St. 601; 11 Atl. Rep. 535; Weaver's Appeal, 63 Pa. St. 309; Stern's Estate, 3 Pa. Dist. Rep. 369; Cazassa v. Cazassa, 92 Tenn. 573; 22 S. W. Rep. 560; Newell v. Newell, 13 Vt. 24; Roberts v. Coleman, 37 W. Va. 143; 16 S. E. Rep. 482. And the intention or understanding of the child is

immaterial. *Holliday v. Wingfield*, 59 Ga. 206; *Power v. Power's Estate*, *supra*.

If the transaction constitutes an absolute gift at the time it occurs, it cannot be subsequently changed into an advancement by the parent alone. *Sherwood v. Smith*, 23 Conn. 516; nor into a debt or trust if it was an advancement. *Cleaver v. Kirk's Heirs*, 3 Metc. (Ky.) 270; nor without the intervention of a new consideration. *Higham v. Vanosdol*, 125 Ind. 74; 25 N. E. Rep. 140; *Albert v. Albert*, 74 Md. 526, 22 Atl. Rep. 408; *Forman's Estate*, 2 Pa. St. 260. But the parent can convert a gift made by way of advancement into an absolute gift. *Sherwood v. Smith*, *supra*; *Herkimer v. McGregor*, 126 Ind. 247, 256; 25 N. E. Rep. 145; and a debt into an advancement. *Wentz v. De-Haven*, 1 S. & R. (Pa.) 812; *Strock's Estate*, 158 Pa. St. 855; 27 Atl. Rep. 1003; *Forman's Estate*, 2 Pa. Dist. Rep. 260; and may do so by his will. *Strock's Estate*, *supra*.

The presumption of law is in favor of that intention most conducive to an equal distribution of the property among the children. *Mitchell v. Mitchell*, 8 Ala. 414; *Ruch v. Biery*, 110 Ind. 444; 11 N. E. Rep. 312; *Herkimer v. McGregor*, 126 Ind. 247, 255; *Culp v. Wilson*, 133 Ind. 294; 32 N. E. Rep. 928; *Parks v. Parks*, 19 Md. 323; *Cecil v. Cecil*, 20 Md. 153; *Clark v. Willson*, 27 Md. 693; *Dilley v. Love*, 61 Md. 603, *Weaver's Appeal*, 63 Pa. St. 309; *Roberts v. Coleman*, *supra*. Hence a transfer of money or other property by a parent to a child, is, in general, presumed to be an advancement. *Mitchell v. Mitchell*, 8 Ala. 414; *Merrill v. Rhodes*, 37 Ala. 449; *Autrey v. Autrey's Adm'r*, *id.* 614; *Holliday v. Wingfield*, 59 Ga. 206, 208; *Grattan v. Grattan*, 18 Ill. 167, 170; *Dillman v. Cox*, 23 Ind. 440; *Woolery v. Woolery*, 29 Ind. 249; *Clark v. Willson*, 27 Md. 693, 701; *Dilley v. Love*, 61 Md. 603; *Beebe v. Estabrook*, 79 N. Y. 246, 254; *aff'd*, 11 Hun, 523; *Alexander v. Alexander*, 41 Hun, 612 (mem.); 1 N. Y. S. R. 501; *Re Sherman*, 2 Con. (N. Y. Surr.) 504; 13 N. Y. Supp. 881; *Hollister v. Attmore*, 5 Jones (N. C.), 373; *Forman's Estate*, 2 Pa. Dist. Rep. 261; *Stern's Estate*, 3 Pa. Dist. Rep. 369; *Morris v. Morris*, 9 Heisk. (Tenn.) 814, 817. Especially if the amount is considerable and is given to a son to enable him to start in business. *Sanford v. Sanford*, 61 Barb. 293; 5 Lans. 487; *McRae v. McRae*, 3 Bradf. 199. Voluntary conveyances of land from a parent to the child are, therefore, presumed to be advancements. *Hatch v. Straight*, 3 Conn. 31; *McCaw v. Burk*, 31 Ind. 56; *Dille v. Webb*, 61 Ind. 85; *Higham v. Vanosdol*, 125 Ind. 74; 25 N. E. Rep. 140; *Ruch v. Biery*, 110 Ind. 444; 11 N. E. Rep. 312; *Scott v. Harris*, 127 Ind. 520; *Culp v. Wilson*, 133 Ind. 294; 32 N. E. Rep. 928; *Phillips v. Phillips*, 90 (Iowa), 547; 58 N. W. Rep. 879; *Parks v. Parks*, 17 Md. 323; *Jakolet v. Danielson*, (N. J.) : 13 Atl. Rep. 850; *Sanford v. Sanford*, 61 Barb. 293; 5 Lans. 487; *Dutch's Appeal*, 57 Pa. St. 461. That the deed recites a money consideration does not preclude proof that the conveyance was an advancement by showing that no consideration was paid, thus establishing the fact that the transaction was an advancement. *Meeker v. Meeker*, 16 Conn. 883; *Sadler v. Huffheimer*, 11 Ky. : 6 Rep. 670; *Spier v. Spier*, 14 N. J. Eq. 240, 248; *Sanford v. Sanford*, *supra*. And a stipulation for an annuity or interest during the lifetime of the grantor does not prevent the conveyance from operating as an advancement. *Ruch v.*

Biery, *supra*. A conveyance to a son-in-law may be shown to be an advancement to his wife. *Sadler v. Huffheimer, supra*; *Roberts v. Coleman*, 87 W. Va. 143; 16 S. E. Rep. 482. A purchase by the parent in the name of the child will also be presumed to be an advancement. *Robinson v. Robinson*, 45 Ark. 481; *Eastham v. Powell*, 51 Ark. 530; *White v. White*, 52 Ark. 188; *Nailer v. Nailer*, 5 Mackey (D. C.), 98; *Brown v. Burk*, 22 Ga. 574; *Woolery v. Woolery*, 29 Ind. 249; *McMahill v. McMahon*, 69 Iowa, 115; *Hall v. Hall*, 107 Mo. 101, 17 S. W. Rep. 811; *Proseus v. McIntyre*, 5 Barb. 424; *Welton v. Devine*, 20 Barb. 9; *Partridge v. Havens*, 10 Paige, 618; *Parker v. Newitt*, 18 Or. 274; *Sampson v. Sampson*, 4 S. & R. 833; *Catoe v. Catoe*, 32 S. C. 545; *McKlintock v. Loiseau*, 31 W. Va. 865; 8 S. W. Rep. 612. Insurance by a father on his life in the name of a son or transferred to the son is presumed to be an advancement. *Rickenbacker v. Zimmerman*, 12 Rich. Eq. (S. C.) 114; *Cazassa v. Cazassa*, 92 Tenn. 578; 22 S. W. Rep. 560. Payment by a father of the debts of his son will also be presumed to be by way of advancement. *Dilley v. Love*, 67 Md. 603; *Johnson v. Hoyle*, 3 Head. (Tenn.) 56, 58; *Steele v. Frierson*, 85 Tenn. 430; 3 S. W. Rep. 649.

As between an advancement and a loan, the presumption is in favor of the former. *Higham v. Vanosdol*, 125 Ind. 74; 25 N. E. Rep. 140.

These presumptions are, however, rebuttable. *Hatch v. Straight*, 3 Conn. 31, 34; *Dillman v. Cox*, 23 Ind. 440; *Woolery v. Woolery, supra*; *Diller v. Webb*, 61 Ind. 85; *Wolfe v. Kable*, 107 Ind. 520; 8 N. E. Rep. 559; *Clark v. Willson*, 27 Md. 693, 701; *Beebe v. Estabrook*, 11 Hun, 528; *Stern's Estate*, 3 Pa. Dist. Rep. 369; *Williams v. Williams*, 15 Lea, 438; *Aden v. Aden*, 16 Lea, 453; *Steele v. Frierson*, 85 Tenn. 430; 3 S. W. Rep. 649. Thus it may be shown that the transaction was intended as an absolute gift. *Mitchell v. Mitchell*, 8 Ala. 414; *Merril v. Rhodes*, 87 Ala. 449; *Wolfe v. Kable*, 107 Ind. 520; *Cecil v. Cecil*, 20 Md. 153; *Dilley v. Love*, 67 Md. 608; *Hattersley v. Bissett*, 50 N. J. Eq. 574; 25 Atl. Rep. 332. *In re Morgan*, 104 N. Y. 74; 9 N. E. Rep. 861; *Alexander v. Alexander*, 41 Hun (N. Y.) 624; (mem.), 1 N. Y. S. R. 501. Or as payment. *Dilley v. Webb, supra*; *Stern's Estate, supra*. Or to create a trust in favor of the parent. *Robinson v. Robinson*, 45 Ark. 481; *Eastham v. Powell*, 51 Ark. 530; *White v. White*, 52 Ark. 188; *Nailer v. Nailer*, 5 Mackey, 98; *Brown v. Burke*, 22 Ga. 574; *Dillman v. Cox*, 23 Ind. 440; *Parker v. Newitt*, 18 Or. 274; 23 Pac. Rep. 246; *McKlintock v. Loiseau*, 31 W. Va. 865; 8 S. E. Rep. 612.

For the purpose of showing the intent all the facts and circumstances surrounding the transaction and the persons involved are to be considered. *Robinson v. Robinson*, 45 Ark. 481; *Wallace v. Reddick*, 119 Ill. 151; 8 N. E. Rep. 801; *Woolery v. Woolery*, 29 Ind. 249; *Dille v. Webb*, 61 Ind. 85, 88; *Higham v. Vanosdol*, 125 Ind. 74; 25 N. E. Rep. 140; *Parks v. Parks*, 19 Md. 328; *Cecil v. Cecil*, 20 Md. 153; *Dilley v. Love*, 67 Md. 608; *Jakolet v. Danielson* (N. J. Ch.), 13 Atl. Rep. 850; *Weaver's Appeal*, 63 Pa. St. 309. Among these circumstances are the relation which the amount and value of the property thus transferred bear to the entire estate. *Ruch v. Biery*, 110 Ind. 444; 11 N. E. Rep. 812; *Dilley v. Love*, 67 Md. 608; *Weaver's Appeal*, 63 Pa. St. 309. The purpose of the transfer. *Weaver's Appeal, supra*. The policy adopted by

the grantor in making disposition of his property. *Merrill v. Rhodes*, 37 Ala. 449; *Brook v. Latimer*, 44 Kans. 431; 24 Pac. Rep. 946; *Walker v. Brooks*, 99 N. C. 207; 6 S. E. Rep. 43.

The fact that the property was given and received at a specified valuation is evidence that it was intended as an advancement and not as a pure gift. *Autrey v. Autrey's Adm'r*, 37 Ala. 614. The giving of a note, bond or mortgage by a child to its parent creates a presumption, on the other hand, that the transaction created a debt, and was not an advancement. *Harley v. Harley*, 57 Md. 340; *Ballou v. Allen*, 5 N. J. Eq. 99; *Speer v. Speer*, 14 N. J. Eq. 246; *Dawson v. Macknet*, 42 N. J. Eq. 633; 8 Atl. Rep. 312; *Bruce v. Griscom*, 9 Hun, 280; *Walker v. Brooks*, 99 N. C. 207; 6 S. E. Rep. 43; *High's Appeal*, 21 Pa. St. 283; *Pott's Appeal* (Pa.), 10 Atl. Rep. 887; *Firman's Estate*, 3 Pa. Dist. Rep. 260; *Vaden v. Hance*, 1 Head. (Tenn.), 300; *House v. Woodard*, 5 Cold. (Tenn.) 196; *Ruiz v. Campbell* (Tex.), *supra*; 26 S. W. Rep. 295. But it may be shown to have been intended as an advancement. *Norman v. Norman*, 11 Ind. 288; *Peabody v. Peabody*, 59 Ind. 556; *Merkel's Appeal*, 89 Pa. St. 340; *Frey v. Heydt*, 116 Pa. St. 601, 610; 11 Atl. Rep. 585; *Vaden v. Hance*, 1 Head. (Tenn.) 300, 305. By proof of what was said and done at the time of the transaction. *Merkel's Appeal*, *supra*; *Frey v. Heydt*, *supra*. And by the conduct of the parent in connection with evidence of the debt. *Sadler v. Huffheimer*, 11 Ky. Law Rep. 670; *Spire's Adm'r v. Longford*, (Ky.) 25 S. W. Rep. 597; *Johnson v. Eaton*, 51 Kan. 708; 33 Pac. Rep. 597. A transfer of property by a father to his daughter taking back an interest-bearing note to the amount of its estimated value, was held to show a debt and not an advancement, though the note was void by reason of the coverture of the daughter, and parol evidence to show that an advancement was intended was held to be inadmissible as tending to contradict the legal effect of the note. *Fennell v. Henry*, 77 Ala. 484; 3 Am. Prob. Rep. 216. The declaration of a grantor at the time of the transfer is admissible to show his intent. *Mitchell v. Mitchell*, 8 Ala. 414; *Merrill v. Rhodes*, 37 Ala. 449; *Autrey v. Autrey's Adm'r*, 37 Ala. 614; *Robinson v. Robinson*, 51 Ark. 481; *Nailer v. Nailer*, 5 Mackey (S. C.), 93; *Duling v. Johnson*, 32 Ind. 155; *Brooks v. Latimer*, 44 Kan. 431; *Parks v. Parks*, 19 Md. 323, 331; *Cecil v. Cecil*, 20 Md. 153; *Speer v. Speer*, 14 N. J. Eq. 240, 248; *Morris v. Morris*, 9 Heisk. 814, 818. But not his subsequent declarations. *Robinson v. Robinson*, *supra*; *Hatch v. Straight* 3 Conn. 31, 34; *Nailer v. Nailer*, 5 McKey (D. C.), 93; *Phillips v. Chappel*, 16 Ga. 16; *Harkness v. Harkness*, 49 Ind. 334; *Harley v. Harley*, 57 Md. 340; *Chase v. Ewing*, 51 Barb. (N. Y.) 597; *Sanford v. Sanford*, 61 Barb. (N. Y.) 293; 5 Lans. 487; *Haverstock v. Sarback*, 1 W. & S. (Pa.) 390. Unless made in recognition of the original act and intention, of which evidence has been given. *Merkel's Appeal*, *supra*; *Frey v. Heydt*, *supra*. The admissibility of subsequent declarations in general is declared in *Parks v. Parks*, *supra*; *Cecil v. Cecil*, *supra*; *Speer v. Speer*, *supra*; *Woolery v. Woolery*, 29 Ind. 249, is on this point expressly overruled by *Harkness v. Harkness*, 49 Ind. 334, and *Thistlewaite v. Thistlewaite*, 132 Ind. 355; 31 N. E. Rep. 946.

Under the Kentucky statute all the property given to a descendant of one who dies intestate must be charged as an advancement, unless given for main-

taining or educating the child without any view to any portion or settlement. *Clarke v. Clarke*, 17 B. Monr. 704; *Cleaver v. Kirk's Heirs*, 3 Metc. 270; *Polley v. Polley*, 82 Ky. 64; *Phillips v. Phillips Adm'r*, 93 Ky. 414; 20 S. W. 541; *Speer's Adm'r v. Longford (Ky.)*, 25 S. W. 597; the parent or grandfather cannot by a mere declaration either make that an advancement, which is not such by law, or exempt one of his children from liability to account for money or property he has given to him, with which the statute makes him chargeable. This he can only effect by a last will and testament, duly executed, disposing of the whole of his estate, real and personal. *Clarke v. Clarke*, 17 B. Monr. 704; *Cleaver v. Kirk's Heirs*, 3 Metc. 270. So a son is chargeable with the value of the use and occupation of land of the father not held under the contract in writing. *Wakefield v. Gilleland's Adm'r (Ky.)*, 18 S. W. Rep. 768.

In a few states, either by reason of express statutory enactment or by reason of the construction placed on the statutes, it is held that it must affirmatively appear that an advancement was intended. *Simpson v. Simpson*, 114 Ill. 603; *Long v. Long*, 118 Ill. 638; 6 West. Rep. 691; *Wallace v. Reddick*, 119 Ill. 151; 6 West. Rep. 769; *Comer v. Comer*, 119 Ill. 170; 6 West. Rep. 72; *Osgood v. Breed's Heirs*, 17 Mass. 356, 358; *Bulkeley v. Noble*, 19 Mass. (2 Pick.) 337; *Bigelow v. Pool*, 76 Mass. (10 Gray) 105; *Power v. Power's Estate*, 91 Mich. 587; 52 N. W. Rep. 60; *Fellows v. Little*, 46 N. H. 27; *Law v. Smith*, 2 R. I. 244; *Sayles v. Baker*, 5 R. I. 457; *Newell v. Newell*, 13 Vt. 24; *Brown v. Brown*, 16 Vt. 197; *Adams v. Adams*, 22 Vt. 51; *Weatherhead v. Field*, 26 Vt. 665. In some of these states this intent must be evidence by a writing. *Long v. Long*, *supra*; *Wilkinson v. Thomas*, 128 Ill. 363; 28 N. E. Rep. 596; *Bulkeley v. Noble*, *supra*; *Barton v. Rice*, 39 Mass. (22 Pick.) 508; *Power v. Power's Estate*, *supra*. It need not be in any particular form. *Bulkeley v. Noble*, *supra*. It may be a writing by the grantor. *Long v. Long*, *supra*; *Power v. Power's Estate*, *supra*. Such as a paper signed by the grantor simultaneously with the execution of a deed and declaring that the property was given as a portion of the patrimony of the grantee. *Power v. Power's Estate*, *supra*.

A receipt for articles delivered to a child promising to return them if called for, on which the parent wrote that the articles were not to be exacted but were to answer as part of the child's portion. *Bulkeley v. Noble*, *supra*. Or a charge in a book showing that it was intended as an advancement. *Bulkeley v. Noble*, *supra*; *Power v. Power's Estate*, *supra*; *Fellows v. Little*, *supra*; *Brown v. Brown*, *supra*. But entries in a book purporting to show the moneys advanced to the children and the credits for repayment are not sufficient. *Bigelow v. Poole*, *supra*. Or an acknowledgment by the grantee. *Long v. Long*, *supra*. Under the New Hampshire and Rhode Island statutes it may also be shown orally that the property was delivered expressly as an advancement in the presence of two witnesses, who were requested to take notice thereof. *Fellows v. Little*, 46 N. H. 27, 35; *Law v. Smith*, 2 R. I. 244. Under the Vermont statute any deed made for love and affection shall be deemed an advancement. *Newell v. Newell*, *supra*, and a deed reciting a valuable consideration cannot be shown to have been made for love and affection. *Adams v. Adams*, *supra*.

PALMERTON *et al.* vs. HOOP.

[181 Indiana, 23.]

ADMINISTRATORS SALE.—COLLATERAL ATTACK.—FRAUD LIMITATION OF ACTIONS.—INFANCY—ESTOPPEL.

A judgment confirming an administrator's sale is not rendered void as against a collateral attack, by the fraud of the administrator and of the purchaser in the sale at a less price than another person had offered and was ready to pay.

The wife of one of the heirs owning jointly with him the shares of others, and by the death of her husband, pending a proceeding for the sale of the land to pay debts, becoming the owner of his share, is a party to the proceeding within Rev. St., Ind., § 293, sub. 4, providing that actions to recover land sold by administrator on a judgment directing the sale shall be brought within five years after the confirmation if brought by a party to the judgment.

The death of one of the heirs after the making of the order for the sale of the land and before the sale does not render the judgment confirming the sale void as to his heirs though they are not made parties to the proceeding. The position of an infant making a collateral attack on a judgment is no better than that of an adult.

Acceptance and retention of a part of the proceeds of sale is an estoppel to claim that the sale was void.

ACTION for recovery of land. Plaintiffs appeal from a judgment sustaining demurrers to their affirmative answers to the defendant's cross complaint, and also to affirmative replies to the defendant's answer.

Hez Daily and James B. McFadden, for appellants.

K. M. Hord and E. K. Adams, for appellee.

COFFEY, J.—The complaint in this cause consists of three paragraphs. The first paragraph consists of the ordinary complaint for the recovery of the possession of real estate.

The second paragraph alleges that the appellants are the owners in fee, and entitled to the possession, of the three-fifths of the land described therein; that they are the heirs-at-law of Francis M. Palmerton, who died in the year 1872;

that said Francis was the son and heir of Homer Palmer-ton, who died in the year 1870, seised in fee of the land de-scribed in the complaint, with other land in Shelby county, one fifth of which descended to the said Francis, subject to the payment of its portion of the debts of the said Homer; that the said Homer left four other heirs, two of whom conveyed to the said Francis and the appellant Margaret Van Dorn, who was at the time the wife of said Francis; that the said Francis took letters of administration on the estate of Homer Palmerton, and procured an order of the proper Probate Court to sell said land for the payment of the debts due from said estate, but died before a sale was consummated; that David Smith was appointed adminis-trator *de bonis non* of said estate, and sold the land to the appellee for the sum of twelve dollars an acre, when he was offered by another person, who was able, willing, and ready to purchase the same, the sum of twenty-five dollars an acre; that the sale was made by Smith to the appellee without the knowledge or consent of the person offering twenty-five dollars an acre for the same, and without the knowledge or consent of the appellants, or either of them, and for the fraudulent purpose of putting the title in the ap-pellee, and for the purpose of cheating and defrauding the appellants; that the appellee is now in the possession of the land under said purchase, and that he has no other title thereto; and that, for more than ten years last past, he has kept the appellants out of possession of said land.

The third paragraph is, in legal effect, the same as the second, except that it alleges, in addition, that Smith, the administrator, and appellee, conspired together to sell the land to the appellee for less than one-half its value.

Each of the paragraphs of the complaint prays for pos-session of the land, and damages for its detention. The appellee answered —*First*, the general denial; *third*, to the second and third paragraphs of the complaint, the five years statute of limitations; *fourth*, to the first paragraph of the complaint, the five-years statute of limitations, aver-ring that the appellee holds the land under an adminis-

trator's sale; *fifth*, estoppel, alleging that a part of the purchase money paid for the land at administrator's sale was received by the adult heirs of Francis M. Palmerton, and a part by the guardian of his infant heirs; that the infants have since become of age, and settled with the guardian, and have received their portion of said money; that all the appellants still hold the purchase money for said land so received by them.

The appellee also filed a cross complaint setting up title in himself, and asking to quiet his title. He also filed a claim under the occupying claimant's act.

A number of affirmative answers were filed by the appellants to the cross complaint of the appellee, to which the court sustained a demurrer.

The appellants Francis M. and Emma M. Palmerton filed a separate reply, consisting of five paragraphs, the first being a general denial.

The second is addressed to the third paragraph of the answer, and admits the purchase by the appellee at administrator's sale, but alleges that they were not parties to proceedings which resulted in the order for the sale, and had no notice thereof, and that they had no notice of the frauds set up in the complaint until a few days prior to the commencement of the suit.

The third paragraph of the reply is addressed to the fourth paragraph of the answer, and alleges that they were not parties to the proceeding resulting in the order to sell the land and had no notice thereof; that, at the time the petition for the sale of the land was filed, they were minors under the age of twenty-one years, and that they are yet under the age of twenty-one years; that they had no notice of the fraud alleged in the complaint until a short time before the commencement of this suit.

The fourth paragraph of the reply is addressed to the fifth paragraph of the answer, and alleges that the order to sell the land was obtained by Francis M. Palmerton, and that he died before the sale was consummated; that Smith was appointed administrator *de bonis non*, and procured an

order for reappraisement of the land, and to sell at private sale, without any notice of his application therefor; that he procured the order in the year 1874, and in the year 1875 sold the land to the appellee for its full appraised value, but for less than one-half of its actual value when he was offered more than double the sum paid by the appellee; that the appellee was one of the appraisers who reappraised the land.

The fifth paragraph of the reply is addressed to the third, fourth, fifth, and sixth paragraphs of the answer, and alleges substantially the same facts set up in the second and third paragraphs of the complaint, and in addition thereto, that the appellants Francis M. and Emma M. Palmerton are yet minors under the age of twenty years; that Smith, as administrator, procured a reappraisement of the land, and an order to sell at private sale, without giving any notice of his application therefor, and that appellee was one of the appraisers who reappraised the land; and that the appellants did not discover the fraud alleged in the complaint until the year 1888.

The appellants also filed a joint reply consisting of five paragraphs, which do not differ materially in legal effect from the separate replies filed by the appellants Francis M. and Emma M. Palmerton, above set forth.

The court sustained a demurrer to each of these several affirmative replies, and the appellants electing to stand on these pleadings, withdrew the general denials, and the appellee had no judgment for costs.

No question is made in this court as to the sufficiency of the complaint, or as to the sufficiency of the answers above referred to. It is urged, however, that the Circuit Court erred in sustaining demurrers to the affirmative answers to the appellee's cross complaint and to the affirmative replies

No available error was committed by the Circuit Court in sustaining a demurrer to the affirmative answers of the appellants to the cross complaint of the appellee to quiet title, as all defenses thereto were admissible, under the

general denial which was pleaded. (*Webster v. Bebinger*, 70 Ind. 9; *Over v. Shannon*, 75 Ind. 352; *East v. Peden*, 108 Ind. 92; 8 N. E. Rep. 722; Rev. St. 1881, § 1055.)

Each paragraph of the complaint in this cause proceeds upon the theory that sale of the land in controversy by the administrator of the estate of Homer Palmerton was absolutely void.

In other words, each paragraph of the complaint is to recover the possession of the land, and damages for its detention, upon the assumption that the title of the appellants has never been divested. Upon this theory the appellants must recover, if they recover at all, in this action. In all pleadings subsequent to the complaint, it appears that an order was made, upon proper petition, by a court of competent jurisdiction, with the proper parties before the court to sell the land for the payment of the debts due from the estate of Homer Palmerton; that a sale was made, the purchase price paid, the sale reported to the court and approved, and a deed made by the administrator, and approved by the court. It remains, therefore, to inquire whether the matters relied on by the appellants rendered the sale void.

It is contended by the appellants, that the sale was void for the reason—*First*, that there was a fraudulent conspiracy and combination between the administrator and the appellee to transfer the title to the land for much less than its value; *second*, for the reason that the appellants were not parties to the proceedings to sell the land, and had no notice thereof, and are not, therefore, bound by the orders and judgment of the court.

The fraud alleged in the complaint did not render the judgment of the court confirming the sale void. A judgment of a court of competent jurisdiction is not void, in a legal sense, unless the thing the making it so is apparent upon the face of the record.

If the infirmity does not so appear, the judgment may be voidable, but it is not void. (*Earl v. Earl*, 91 Ind. 27.)

A judgment obtained by fraud is binding on the parties until set aside in some proceeding instituted for that purpose. (*Weiss v. Guérineau*, 109 Ind. 438; 9 N. E. Rep. 399.)

As we understand the pleading before us, it is not claimed that the appellant Mrs. Van Dorn was not a party to the proceeding resulting in an order to sell the land. The claim is, as we understand it, that after the death of Francis M. Palmerton, the former administrator, and the appointment of Smith as administrator *de bonis non*, the heirs of the said Francis, to whom three fifths of the land descended, were not made parties to the subsequent proceedings, resulting in a sale and conveyance of the land to the appellee.

By an act of the general assembly approved February 23, 1855, (Rev. St. 1876, p. 525), in force at the time the sale in question was made, Smith, the administrator *de bonis non*, was authorized to sell the land on the order procured by his predecessor in the trust.

By the death of Francis M. Palmerton, Mrs. Van Dorn, who was then his wife, became the owner of two fifths of the land in dispute, as the survivor of her husband. She also became the owner of one third of one fifth as his widow. As she was a party to the proceeding, she is bound by all that was done in the case, and is barred by the five-years statute of limitations. She is also estopped from claiming the land by reason of accepting, and still retaining a part of the price for which it was sold. She cannot have both the land and the purchase price. (*Jennings v. Kee*, 5 Ind. 259; *State v. Stanley*, 14 Ind. 411; *Dequindre v. Williams*; 31 Ind. 456; *Railroad Co. v. Norman*, 22 Ind. 63; *Webster v. Bebinger*, 70 Ind. 14; *Bumb v. Gard*, 107 Ind. 575; 8 N. E. Rep. 713.)

It follows that the joint replies of herself and the other appellants were bad, and the court did not err in sustaining the demurrer thereto.

It remains to inquire whether the failure to make the other appellants, who are the minor children of Francis M.

Palmerton, parties to the proceeding after his death, and before confirmation of the sale, renders the sale as to them void.

There is no question made as to the fact that the court had jurisdiction of Francis M. Palmerton, their father, at the time of his death. When the land descended to them, they took it, therefore, subject to the order previously made by the court to sell it. All that remained to be done was to sell the land, report the sale to the court, procure its confirmation, and execute a deed to the purchaser.

The fact that Francis M. Palmerton died did not deprive the court of jurisdiction to render a judgment of confirmation.

Black, Judgm. § 200, says: "The great preponderance of authority is to the effect that where the court has acquired jurisdiction of the subject-matter and the persons, during the life time of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void, nor open to collateral attack." This doctrine seems to be fully sustained by the authorities cited by Mr. Black in its support. (See, also, Freem. Judgm. §§ 140-153.)

Where it appears upon the face of the record that a party against whom judgment is rendered was dead at the date of the judgment, Mr. Freeman (section 153, *supra*) says: "Even in such cases the judgment is simply erroneous, but not void. This is because the court, having obtained jurisdiction over the party in his lifetime, is thereby empowered to proceed with the action to final judgment; and while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal, if the fact of the death appears upon the record, or by writ of error *coram nobis*, if the fact must be shown *aliunde*."

Following these authorities, we are constrained to hold that the judgment of the court confirming the sale made by Smith, administrator *de bonis non*, to the appellee, is not void, and is not subject to a collateral attack like this. In

the matter of a collateral attack on a judgment a minor stands in no better situation than an adult.

It follows that the court did not err in sustaining the demurrer of the appellee to the several affirmative replies of the appellants Francis M. and Emma M. Palmerton.

Judgment affirmed.

RICHARD BROMLEY vs. WILLIAM W. MITCHELL AND
ANOTHER.

[155 Massachusetts, 509.]

DEED OR WILL—TRUSTS—ACTIONS.

A deed purporting to convey presently and irrevocably all the grantor's personal property upon certain trusts is not invalid though executed only two days before the death of the grantor and the trusts are testamentary in their character.

The grantee in such a deed can sue to recover the possession of the property without describing himself as trustee, nor are the personal representations of the grantor necessary parties to such an action.

REPORT from Supreme Judicial Court, Suffolk county.
Bill in equity by Richard Bromley against William W. Mitchell and others. Respondents appeal from a decree for complainant.

Williams & Copeland and William H. Sweetland, for plaintiff.

Chas. Theo. Russell, Chas. A. Wilson, and Arthur H. Russell, for respondents.

HOLMES, J.—This is a bill to recover possession of certain mortgage notes and mortgage deeds held and secreted by the defendants so that they cannot become at to be replevied. The defense is rested mainly on the invalidity of

the deed under which the plaintiff claims title. The judge who tried the case found the deed to be valid; and the question is whether there is any ground on which we can say, as matter of law, that he was wrong.

The deed is an absolute conveyance of all the grantor's property, which was all personalty, in trust, to apply the income of or proceeds of the sale of the same in accordance with the instructions previously given to the plaintiff by the grantor. These instructions and trusts, as found by the judge, certainly have a very testamentary look; and, as the deed was executed only two days before the grantor died, we appreciate the strength of the argument that the parties must have understood that the testament was to take effect only in case the grantor died, and that it is not a deed, but an ineffectual will.

But, on the face of the deed, it is a conveyance operating at once and irrevocably; and there is nothing in the parol trusts which is not reconcilable with the same interpretation. It is perfectly possible to convey all one's property upon a present, irrevocable trust, to pay one's debts, and so forth, as found in this case. If the trusts include gifts which do not pass to the possession of the *cestuis que trustent* until the death of the donor, that is not conclusive against the instrument being a deed, and valid as such. (*Krell v. Codman*, [Mass.] 28 N. E. Rep. 578, [Oct., 1891]; *West v. West* [Mass.] 29 N. E. Rep. 582 [Jan., 1892].) This case is not like that of an instrument purporting to convey only such property as the grantor may own at his death, and leaving him with all the rights of ownership, and free to dispose of what he sees fit, meantime. (*Gage v. Gage*, 12 N. H. 371; *In re Diez*, 50 N. Y. 88; *In re Knight*, 2 Hagg. Ecc. 554.) Nor is it the case of an instrument purporting to be a will, notwithstanding some ambiguous expressions. (See *Habergham v. Vincent*, 2 Ves. Jr. 204, 230, 231; *Hickson v. Witham*, Finch, 195, 1 Ch. Cas. 248; *Carle v. Underhill*, 3 Bradf. Sur. 101.) Nor is it like any other, where, rightly or wrongly, the document is construed as irrevocable on its face. (*Turner v. Scott*, 51 Pa. St. 126; *Frede-*

rick's Appeal, 52 Pa. St. 338; *Frew v. Clark*, 80 Pa. St. 170, 178; *Symmes v. Arnold*, 10 Ga. 506^o; *Sartor v. Sartor*, 39 Miss. 760, 771, 772; *Warriner v. Rogers*, L. R. 16 Eq. 340, 353.) (Compare *West v. West*, *supra*.)

If, then, we are to decide in favor of the defendant, we must look outside of the deed. If we do that, it seems a strong thing to say that the instrument purporting to operate at once upon execution may be shown to have been intended or understood by the parties to take effect only on the grantor's death, by evidence which does not go to the height of negating an effectual delivery. (See *Green v. Froud*, 3 Keb. 310, 1 Mod. 117; *Wareham v. Sellers*, 9 Gill & J. 98; *Lautenshlager v. Lautenshlager*, 80 Mich. 285, 45 N. W. Rep. 147; *Sharp v. Hall*, 86 Ala. 110, 5 South. Rep. 497; Compare *Fairbanks v. Metcalf*, 8 Mass. 230, 238; *Ward v. Lewis*, 4 Pick. 518, 520; *Stevens v. Stevens*, 150 Mass. 557, 23 N. E. Rep. 378; *Glynn v. Oglander*, 2 Hagg. Ecc. 428, 431, 432.) That proposition is very different from saying that when a deed fails as a deed, for some independent reason, it may have effect as a will; a principle formerly applied in England, but now of little practical importance in this state, since the requirement of three witnesses for all wills. (*Masterman v. Maberly*, 2 Hagg. Ecc. 235, 247; *In re Morgan*, L. R. 1 Prob. & Div. 214; *Milledge v. Lamer*, 4 Desaus. Eq. 617, 622.)

But whether or not the defendants could make out a case outside of the deed, except by disproving the delivery, the understanding of the parties, as well as the delivery, is a question of fact; and whatever is material to the plaintiff's case has been found in his favor. The evidence is not before us, and there is nothing which enables us to say that the finding was wrong. We must take it that the parties understood and intended an immediate conveyance, if that is material, and the instrument was delivered. As it purports to be such a conveyance, and as the trusts are consistent with its being so, the plaintiff's case is made out. There are not the same objections to a reference outside the document for the trusts which in *Olliffe v. Wells* (130

Mass. 221), were held to exist in the case of a will, if it is not enough to say that the deed gives the plaintiff the legal ownership of the papers.

There is no question here of any intention to defeat rights of third persons, which would have been paramount if the grantor attempted to make the same disposition by will, if such intent could be material when an otherwise valid conveyance is made. (*Krell v. Codman* [Mass.] 28 N. E. Rep. 578 [Oct., 1891]; *White v. Bigelow* [Mass.] 28 N. E. Rep. 904 [Nov., 1891]; *Stone v. Hackett*, 12 Gray, 227, 233.)

There was no necessity for the plaintiff to describe himself as a trustee. *Association v. McAllister*, 153 Mass. 292, 297, 26 N. E. Rep. 862. It would not have been proper to make the grantor's executor or administrator a party. The issue is simply whether the plaintiff can replevy certain chattels of the defendant, not what will become of them if the plaintiff fails. No one but the present parties is entitled to be heard on the question which of the two, as between themselves, shall have possession of the chattels.

Decree for plaintiff.

An instrument by which certain personalty is transferred to one in trust, to pay the income and profits arising from it to the grantor during her life, and directing that money coming into the hands of the grantee by virtue of the trust shall be invested in real estate designated by the grantor, and that after her death the grantee shall distribute among her children all of said property, does not constitute a gift *inter vivos*, nor is it a testamentary disposition, but is a deed of trust operating *in praesenti*. *Cumming v. Cumming*, 3 Ga. 469, 484; *Jackson v. Culpepper*, id. 569, 573; *Forney v. Remey*, 77 Iowa, 549; 7 Am. Prob. Rep. 476; 42 N. W. Rep. 439; *Mayor of Baltimore v. Williams*, 6 Md. 235, 262. As to the distinction between instruments testamentary in their character and those creating a present interest or obligation, see note to *Robinson v. Brewster*, *supra*.

In Matter of Proving the Last Will and Testament of
VIRGINIA S. KAUFMAN, formerly Virginia S. Dillon,
Deceased.

[181 New York, 620.]

REVOCATION OF WILL — MARRIAGE OF WIDOW.

A will made by a widow is revoked by her subsequent remarriage, she being an unmarried woman within the meaning Rev. St., N. Y., art. 3, tit. 1, c. 6, providing that the marriage of an unmarried woman shall have that effect.

APPEAL from judgment of Supreme Court, general term, first department, affirming the decree of the surrogate of New York county refusing to admit to probate the will of Virginia S. Kaufman, deceased.

Louis Marshall and *Henry J. Meinhard*, for appellant.

Wise & Lichtenstein, (*Morris S. Wise*, of counsel,) for respondent.

GRAY, J.—This will was made by the deceased while she was the widow of one Dillon. She subsequently intermarried with Kaufman, and died, leaving him surviving. The executor appointed in this will offered the instrument for probate, but was opposed in his proceedings by Kaufman, who claimed that the will had been revoked by testatrix's marriage with him, and who has been sustained in that claim by the surrogate and the general term. In their decisions, those courts were clearly right, and we should say nothing here, in disposing of this appeal, were it not for the statement that there is no authoritative decision by this court upon the particular question. We should suppose that the case of *Brown v. Clark*, (77 N. Y. 369), was a sufficient authority in point, although the testatrix in that case was a woman who had never been married at all. For any discussion as to the operation of the acts passed by the legislature of this state in relation to married women, and

their effect in conferring upon them testamentary capacity, reference may be had to that case.

The appellant attempts an argument upon the meaning to be given to the words "unmarried woman" in the statute, and seeks to give substance to it by reference to some cases arising upon the construction of wills, and where the discussion bore upon the presumed intention of the testator in his gifts or limitations of property. But such cases can have no influence upon the question of what is accomplished by the Revised Statutes in the provision that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage." (Chapter 6 of title 1 of article 3, part II, 2 R. S. 64, § 44.)

It was a recognition of the common-law rule, which, in the operation of the statute upon the civil *status* of the married woman, is unaffected by the enlargement of her legal capacities. At common law, the *feme sole*, in marrying, merged her legal identity in that of her husband. In the unity of person caused by the marriage relation the wife lost the control of her property, and hence of her will. Under our statutes, that identity of person is only affected and separate legal capacity is only conferred upon the wife to the precise extent mentioned in the enabling acts. As we have repeatedly held, the common law has been no further abrogated than is read in the statute. Nothing has been enacted which alters the provision that her will is revoked by a subsequent marriage. There is sufficient reason for the continuance of the rule in the changed relations of the woman. Her new *status*, as wife, induces the presumption of a new testamentary intention, and demands a new testamentary act. The unmarried woman, referred to by the statute, must be defined according to that rule of statutory construction which requires that the words used in legal enactments shall be understood and taken in their ordinary and familiar significance. So read, the unmarried woman of the statute is the woman who is not in a state of marriage. That the legislature could have had any other idea is both inconceivable and unreasonable.

The judgment below should be affirmed, with costs to the respondent, as against the appellant.

All concur.

As to the revocation of a will by the marriage of a *feme sole*, see note to *Holtt v. Holtt*, 5 Am. Prob. Rep. 528.

JOSEPH P. ROBINSON *et al.* v. ELIZA J. BREWSTER *et al.*

[140 Illinois, 649.]

FORM OF WILL—SIGNATURE BY MARK—ATTESTATION—PROOF—
DECLARATIONS.

An instrument in form assigning and setting over to a daughter in consideration of one dollar and of the grantor's affection, all his property, real and personal, to have the same after his death is a valid will if executed in the proper manner.

A will is effectively signed when the testator makes his mark in the presence of the subscribing witnesses.

A formal attestation clause is not necessary to the validity of the will; it is sufficient if the witnesses sign their names in the presence of the testator and at his request.

One of the witnesses to the will having died, proof of his signature and that the will and the signature of the testator are in his handwriting and the testimony of the other witness that both were present when testator signed the will, and that he believes the testator to have been of sound mind and memory is sufficient proof of the execution of the will to entitle it to be admitted to probate.

In the absence of any evidence tending to show that testator did not know the contents of the will, the admission in evidence of his declarations made after the execution is not prejudicial error.

ERROR to Circuit Court, Macon county.

Bill to set aside will of Joseph Robinson, deceased. Complainants bring error to a judgment sustaining the will.

W. C. Johns, for plaintiffs in error.

Buckingham & Schroll and *W. T. Cassins*, for defendants in error.

MAGRUDER, C. J.—This is a bill filed in the Circuit Court of Macon county on April 4, 1890, by Joseph Robinson and Margaret McRoberts, children of Joseph Robinson, deceased, against Eliza J. Brewster and Christopher C. Robinson, also children of said deceased, and Casper Ellwood, administrator with the will annexed of the estate of said Joseph Robinson, for the purpose of setting aside the will of said Joseph Robinson. Eliza J. Brewster and the administrator answered the bill, but Christopher C. Robinson failed to answer, and default was entered against him. The court directed an issue of law to be made up whether the writing described in the pleadings, and purporting to be the will of the deceased, was the last will and testament, and, said issue having been submitted to the jury for trial under instructions from the court, a verdict was returned finding such writing to be the will of the said Joseph Robinson. Motion for new trial was overruled, and decree rendered in accordance with the verdict, finding that said will was duly executed, and ordering the same to be established and confirmed, and dismissing the bill as to the defendants who answered.

Joseph Robinson died testate on January 13, 1890, leaving him, surviving, as his only heirs at law, the four children above named, and owning certain lots in Decatur, and land in Macon county, and a considerable amount of personal property. On January 17, 1890, the defendant in error Eliza Jane Brewster produced before the County Court for probate, as the will of her deceased father, the following instrument, to wit: "Know all men by these presents, that I, Joseph Robinson, for the consideration of one dollar, to me in hand paid, as well as my affection, do hereby assign, and set over to my daughter Eliza Jane Brewster all of my property, both personal and real, to have the same after my death.

Witness my hand and seal this 7th day of May, 1877.

JOSEPH ^{his}X ROBINSON.
mark

(Attest):

J. S. POST, [SEAL.]
E. McCLELLAN." [SEAL.]

This instrument was then and there admitted to probate as the will of the deceased by the County Court. The proceedings upon the probate thereof show that E. McClellan and William T. Cassius personally appeared in open court, and swore that they personally know the handwriting of J. S. Post, subscribing witness to said instrument, and well knew his signature, and had frequently seen him write, and that they verily believed that the name of J. S. Post, subscribed as witness to the execution of said will, was thereto subscribed by him as such subscribing witness; and E. McClellan, the subscribing witness to said instrument, swore that he was present, and saw the said Joseph Robinson sign said instrument, and that he believes the said testator was of sound mind and memory, of lawful age, and under no constraint when he signed said will.

Upon the trial before the Circuit Court, the files of the County Court, showing the said document as the will of the deceased, together with the accompanying affidavits of the witnesses as above set forth, and the oath of the administrator, were admitted in evidence. The material part of the testimony of McClellan, as introduced by the defendants upon the trial, is as follows: "I am circuit clerk of Macon county and have been twenty-two years. I knew Joseph Robinson twenty-five years, I guess. I saw this instrument of writing in J. S. Post's office on May 7, 1877. By request of Joseph Robinson I went up to J. S. Post's office, and witnessed the same. My best recollection is, I was standing on the sidewalk in front of Skelly's grocery store when he made the request. At that time his mind and memory were both good. He said he was making his will, and wanted me to witness it. J. S. Post was acting as an attorney. J. S. Post wrote and prepared the instrument in controversy in this case, proposed by Eliza Jane Brewster as the will of Joseph Robinson. Upon that occasion I went with Robinson to Post's office, for the purpose aforesaid. Robinson signed it by his mark, and Post and I witnessed it. The instrument was signed by Robinson himself in the presence of Post and myself. We were all

present at the same time. Robinson signed it, and then Post and I signed it as witnesses. Post and I signed it as witnesses in the presence of and at the request of Robinson. That is J. S. Post's signature, and I saw him write it there. That is the signature of E. McClellan, and in his handwriting. When he executed this instrument Robinson's mind was sound, and his business capacity was good. I had business transactions with him up to within six months of his death. I don't recollect whether the instrument was read over to him or not at that time. I knew Post for forty years, and was intimately acquainted with him. He was a practicing attorney. I have seen him write, and am familiar with his handwriting. The body of the instrument is in his handwriting. He is dead. His death occurred before January 17, 1890, about five years ago, I think. I saw Robinson make his mark to said instrument. I don't know whether Post saw Robinson sign it by making his mark or not. He was present, and in a position where he could have seen him sign it. Post superintended the execution of the instrument. I can't tell whether Robinson saw me sign my name as a witness. He was in a position to have seen me sign it. We all signed it at the same time, and at the same table, and were within a few feet of each other during the whole transaction. Robinson controlled his real and personal property himself. It was only a few minutes after he requested me to go up to Post's office before I went up and saw him sign the paper in controversy. The instrument had been prepared previous to our going there upon that occasion. The instrument now shown me is the same which was shown to me when I testified in the County Court at the time it was admitted to probate." Upon cross-examination the witness said: "Robinson could not read or write. Part of the time he was a man of very intemperate habits. I don't think his habits were worse in 1877 than at other times. I don't think he was an habitual drinker. I do not think he was intoxicated when I met him on the street. Skelly's grocery was across the street from Post's office,—eighty feet, probably. I walked across

the street with Robinson. I remained at Post's office some time, talking, after I signed the paper. It was written when we got there, except the signature. I think the words, 'Joseph Robinson, his mark,' were written when we got there. I don't think it was read over to Robinson while I was there. I don't recollect that Post or Robinson said anything about the contents of the paper, or about the paper having been read over to Robinson. He did not request me to sign it as a witness in the office, but on the sidewalk. He did not have the paper with him when he met me on the sidewalk; this is the paper they requested me to sign when I got up in the office. I do not recollect whether Robinson said anything about this paper being his will after we got into the office. When my attention was first called to this paper, my recollection of it was very indistinct. If I had not seen my signature, I could not have recalled the transaction. Before April 4, 1890, I told Mr. Johns I could not remember whether anything was said to me by Robinson about this paper being a will." Upon his redirect examination, the witness said: "Robinson was all right, as to sobriety, when this instrument was executed. He was in a condition to transact business intelligently at that time. No persons were in the office at the time except Post, Robinson and myself. My opinion is that Robinson understood all about it. I do not pretend to say of my own knowledge that Robinson knew the contents of this paper which I signed as a witness."

The defendants examined only two other witnesses besides McClellan. One of these swore that upon one occasion Mr. Robinson was talking to her about his daughter Eliza, and said that a couple of months after the death of his wife he had gone up into Capt. Post's office, and made out a paper, and had come home and given it to Eliza; so that after he was dead and gone she should have all he was worth. The other witness testified that he was upon one occasion at Mrs. Brewster's house when her father was there, and this paper was produced and read in the hearing of Mr. Robinson, and he said it was his will, and just what he had ordered.

The complainants introduced no testimony except that of three witnesses, whose evidence tends to show that Post, the attorney, had moved his office from its former location, so that in May, 1877, it was not at the place where the witness McClellan had located it.

The evidence other than that of McClellan tends to show that the deceased could read what was printed, but could not write, or read what was written.

1. As to the execution of the instrument admitted to probate as the will of Joseph Robinson, deceased. There is a concurrence of the four requisites which have been held to be necessary in order to entitle a will to probate. (*Canatsey v. Canatsey*, 130 Ill. 397; 22 N. E. Rep. 595.) (1) The instrument is in writing, and was signed by Joseph Robinson. McClellan swears that he saw Robinson make his mark, and a signature is just as effective where the testator makes his mark as where he signs his name. (*Doran v. Mullen*, 78 Ill. 342.) (2) The instrument is attested by two credible witnesses, McClellan and Post. The subscribing witnesses signed the instrument in the presence of Robinson, and at his request, and their names are written opposite or under the word "Attest." It is not indispensable that the witnesses should subscribe any formal clause of attestation. (1 Redf. Wills, 4th ed. p. 232, § 6, and note 14.) (3) McClellan, one of the subscribing witnesses, swears that he and Post, the subscribing witnesses, were present when Robinson signed the instrument, and that he, McClellan, saw Robinson sign it, and it was so signed by him in the presence of the two subscribing witnesses. The two subscribing witnesses do not declare on oath in this case that they were present and saw the testator sign the instrument in their presence, because one of them died before the will was admitted to probate in the County Court. But section 6 of the act in regard to wills provides that "in all cases where any one * * * of the witnesses to any will * * * shall die, * * * so that that his * * * testimony cannot be procured, it shall be lawful * * * to admit proof of the handwriting of any such deceased

* * * witness, * * * and such other secondary evidence as is admissible in courts of justice to establish written contracts generally, in similar cases. Here it was proven that the signature of J. S. Post, as subscribed to the instrument, was in the handwriting of said Post, and that the instrument itself was in his handwriting, and that he was present and superintended the execution of the instrument. We think that the proof required by section 6 was furnished, and that, under that section, the will was as much entitled to probate as though the deceased witness had been present. (4) It is proven by the testimony of McClellan that he believes Robinson to have been of sound mind and memory when he signed the instrument. We are of opinion that the execution of the instrument was properly established by proof.

2. It is claimed by the plaintiffs in error that the court below erred in admitting evidence of the declarations of the testator made after and subsequent to his execution of the instrument in question. It is also claimed that the court erred in instructing the jury that the presumption of the testator's knowledge of the contents of the instrument, arising from the fact that he signed it, might be considered by them, "in connection with all the other evidence in the case, in determining the question as to whether he actually knew the contents of the paper at the time he executed it."

The parol declarations of a testator, made before or after the execution of a will, cannot be admitted for the purpose of invalidating the will. (*Dickie v. Carter*, 42 Ill. 376.) It has been held, however, that declarations of a testator, made subsequently to the execution of a will, may sometimes be admitted merely for the purpose of showing his knowledge of its contents in cases where it has been charged that he was imposed upon by not being informed of such contents. (1 Redf. Wills, 4th ed., p. 567, c. 10, §§ 14, 15.) In the present case we think that the evidence of such declarations might well have been omitted, but we do not think they could have done the complainants any harm. Where the execution of a will by the testator is proven, as

was done in this case, in such manner as the statute prescribes, it will be presumed that the testator knew its contents. (1 Redf. Wills, 4th ed., p. 567, c. 10, § 14, note 61.) Our statute of wills does not require that the party executing a will shall make a declaration that it is his will. (*Dickie v. Carter, supra.*) In this case, however, the proof does show that the testator told McClellan he was making his will, and wanted McClellan to witness it. The paper in controversy was produced to McClellan a few moments after he was asked to go to Post's office to witness a will. It is true that the instrument was not read over to Robinson at the time of its execution, nor did he then formally declare in words that it was his will. But it is not necessary to prove that the testator knew the contents of the will. Such knowledge is presumed from the fact of his execution of it. (*Doran v. Mullen, supra*; *Keithley v. Stafford*, 126 Ill. 507; 18 N. E. Rep. 740.) In the case at bar the complainants introduced no proof whatever to rebut the presumption of knowledge arising from the execution of the instrument. If, therefore, the evidence of subsequent parol declarations tending to show knowledge of its contents had not been introduced, the jury would have been justified in finding that Robinson knew the contents of the paper from the fact that he signed it. The evidence of the declarations was merely cumulative, and in aid of the presumption arising from the execution. There is no proof that any fraud or imposition was practiced upon Robinson, or that anything was done to conceal from him the nature or meaning of the instrument which he was signing. Where testimony only tends to establish what, in the absence of proof, is a legal presumption, it may be irrelevant, but it can certainly work no injury in the absence of any proof tending to rebut or overthrow such presumption. (*Powell v. McCord*, 121 Ill. 330; 12 N. E. Rep. 262; *In re Bonse's Will*, 18 Ill. App. 433.)

3. As to the form of the instrument. "A last will and testament may be defined as the disposition of one's property to take effect after death." (1 Redf. Wills, 4th ed., p.

5, c. 2, § 2, par. 1.) The instrument in controversy is a disposition of property to take effect after death. It is testamentary in character, and wholly executory. The daughter was not to have or become the owner of the estate until her father's death. The vesting is deferred both in interest and possession, until the death of the maker. The statement to McClellan that he was making his will, and request to McClellan to come and witness the will, made, as such statement and request were, only a few moments before signing the paper, so as to be really a part of the *res gestæ*, indicate that it was Robinson's intention to make this instrument his will. (*Frew v. Clark*, 80 Pa. St. 170; *Johnson v. Yancey*, 65 Amer. Dec. 646; 20 Ga. 707; *Badgley v. Votrain*, 68 Ill. 25; *Olney v. Howe*, 89 Ill. 556; *Roth v. Michalis*, 125 Ill. 325; 17 N. E. Rep. 809; *Comer v. Comer*, 120 Ill. 420; 11 N. E. Rep. 848.)

4. The instructions given conform to the views herein expressed. The only one of the given instructions which is complained of has already been noticed. Counsel for plaintiffs in error urge it as error that the court below refused to give instructions numbered 5 and 6, and asked by the complainants. Upon a careful comparison of these refused instructions with those that were given, as they are set forth in the record, we find that all which is material in the former is expressed in the latter.

The decree of the Circuit Court is affirmed.

Testamentary character of instruments.—Whatever may be the form of an instrument, it may be testamentary in its character and, subject to compliance with the statutory requirements as to publication and attestation, entitled to probate. *Walker v. Jones*, 23 Ala. 448, 456; *Kinnebrew v. Kinnebrew's Adm'r*, 35 Ala. 628, 640; *Daniel v. Hill*, 52 Ala. 430, 436; *Jordan v. Jordan's Adm'r*, 65 Ala. 301, 305; *Sharp v. Hall*, 86 Ala. 110, 113; 5 So. Rep. 497; *Mitchell v. Donohue*, 100 Cal. 202; 34 Pac. Rep. 614; *Kirkpatrick v. Pyle*, 6 Houst. (Del.) 659; *Hester v. Young*, 2 Ga. 31, 50; *Sperber v. Balster*, 66 Ga. 317, 321; *Jackson v. Jackson's Adm'r*, 6 Dana (Ky.), 257; *Succession of Morvant*, 45 La. Ann. 207; 12 So. Rep. 349; *Carey v. Dennis*, 13 Md. 1, 17; *Kelleher v. Kernan*, 60 Md. 440, 442; 3 Am. Prob. Rep. 417; *Wall v. Wall*, 30 Miss. 91; *Sartor v. Sartor*, 39 Miss. 760, 771; *Hunt v. Hunt*, 4 N. H. 434; *Turner v.*

Scott, 51 Pa. St. 126, 134; Morrell v. Dickey, 1 John. Ch. (N.Y.) 151; *Ex parte* Day, 1 Bradf. (N. Y.) 476, 482; Frew v. Clarke, 80 Pa. St. 170; Lyles v. Lyles, 2 Nott & Mc. (S. C.) 531; McGee v. McCants, 1 McCord (S. C.), 517; Armstrong v. Armstrong, 4 J. Baxter (Tenn.), 357; 1 Am. Prob. Rep. 206; Ferguson v. Ferguson, 27 Tex. 339. And cannot be given effect as an instrument of a different character because not executed in conformity with statutory requirements. Hester v. Young, 2 Ga. 31, 47; Olney v. Howe, 89 Ill. 556; Cline v. Jones, 111 Ill. 563; 5 Am. Prob. Rep. 341; Cover v. Stem, 677 Md. 449; 6 Am. Prob. Rep. 543; 10 Atl. Rep. 231; Kinard v. Kinard, 1 Speer Eq. (S. C.) 256, 263.

The fact that the instrument can have effect only in a testamentary character is, however, an element in solving the difficulties of a doubtful case and sufficient to procure for it a construction which will give it validity. Kinnebrew v. Kinnebrew's Adm'r, 35 Ala. 628, 640; Trawick v. Davis, 85 Ala. 342, 345; 5 So. Rep. 83; Sharp v. Hall, 86 Ala. 110, 114; 5 So. Rep. 497; Crocker v. Smith, 94 Ala. 295, 298; 10 So. Rep. 258; Succession of Morvant, 45 La. Ann. 207; 12 So. Rep. 349. But an instrument purporting to be a deed of gift, inoperative for want of delivery, cannot, in the absence of proper evidence that a testamentary disposition was intended, be admitted to probate as a will. Estate of Skerrett, 67 Cal. 585; 5 Am. Prob. Rep. 37; 8 Pac. Rep. 181.

It may have the formal requisites and technical phraseology of a conveyance of property. Dunn v. Bank of Mobile, 2 Ala. 152, 155; Shepherd v. Nabors, 6 Ala. 631, 636; Walker v. Jones, *supra*; Kinnebrew v. Kinnebrew's Adm'r, *supra*; Gillbam v. Mustin, 42 Ala. 365; Daniel v. Hill, *supra*; Jordan v. Jordan's Adm'r, *supra*; Sharp v. Hall, *supra*; Crocker v. Smith, 94 Ala. 295; 10 So. Rep. 258; Hester v. Young, *supra*; Dudley v. Mallory, 4 Ga. 52; Robinson v. Schly, 6 Ga. 515; Symmons v. Arnold, 10 Ga. 506; Wellborn v. Weaver, 17 Ga. 267; Hall v. Bragg, 28 Ga. 330; Bright v. Adams, 51 Ga. 289; Nickols v. Chandler, 55 Ga. 369; Arnold v. Arnold, 62 Ga. 627; Sperber v. Balster, *supra*; Donald v. Nesbitt, 89 Ga. 290; 15 S. E. Rep. 367; Miller v. Holt, 66 Mo. 584; 1 Am. Prob. Rep. 199; Will of Belcher, 66 N. C. 51; Singleton v. Bremar, 4 McCord Eq. (S. C.) 12. Or of an assignment of a chose in action. Schad's Appeal, 88 Pa. St. 111. Or be in the form of a promissory note. Jackson v. Jackson's Adm'r, 6 Dana (Ky.), 257. Or of an endorsement of a note. Hunt v. Hunt, 4 N. H. 484. Or the form of a bond. Carey v. Dennis, 13 Md. 1. Or of a draft or bill of exchange. Kirkpatrick v. Pyle, 6 Houst. (Del.) 659; Cover v. Stem, 67 Md. 449; 6 Am. Prob. Rep. 548; Frew v. Clarke, 80 Pa. St. 170. Or of a due bill. Johnson v. Yancey, 20 Ga. 707. Or of a contract. Reed v. Hazleton, 37 Kan. 321; 6 Am. Prob. Rep. 417; 15 Pac. Rep. 177; affirmed in Hazleton v. Reed, 46 Kan. 73; 7 Am. Prob. Rep. 268; 26 Pac. Rep. 450; Will of Diez, 50 N. Y. 88.

If testamentary in its character, an instrument cannot be recognized in any forum until it has been admitted to probate. Shepherd v. Nabors, 6 Ala. 631, 637; Kinnebrew v. Kinnebrew's Adm'r, 35 Ala. 628, 639; Jordan v. Jordan's Adm'r, 65 Ala. 301, 305; Trawick v. Davis, 85 Ala. 342, 346; Wellborn v. Weaver, 17 Ga. 267, 277; Sperber v. Balster, 66 Ga. 317, 322; Thompson v. Thompson, 30 Neb. 489; Schad's Appeal, 88 Pa. St. 111. Wheeler v. Durant,

3 Rich. Eq. (S. C.) 452, 454; *Alexander v. Burnet*, 5 Rich. L. (S. C.) 189, 195.

An instrument is testamentary in its character if it is intended not to be operative during the life of the maker and to be consummated only on his death. *Dunn v. Bank of Mobile*, 2 Ala. 152, 155; *Shepherd v. Nabors*, 6 Ala. 681, 636; *Gillham v. Mustin*, 42 Ala. 265; *Daniel v. Hill*, 52 Ala. 430, 437; *Crocker v. Smith*, 94 Ala. 295; 10 So. Rep. 258; *Hester v. Young*, 2 Ga. 81, 46; *Wellborn v. Weaver*, 17 Ga. 267, 275; *Johnson v. Yancey*, 20 Ga. 707; *Hall v. Bragg*, 28 Ga. 330, 332; *Bright v. Adams*, 51 Ga. 239; *Arnold v. Arnold*, 62 Ga. 627, 638; *Worley v. Daniel*, 90 Ga. 650, 652; 16 S. E. Rep. 98; *Burlington University v. Barrett*, 22 Iowa, 60, 72; *Jackson v. Jackson's Adm'r*, 6 Dana (Ky.), 257; *Will of Diez*, 50 N. Y. 88, 90; *Wall v. Wall*, 30 Miss. 91; *Sartor v. Sartor*, 39 Miss. 760, 771; *Alexander v. Burnet*, 5 Rich. L. (S. C.) 189, 195; *Crawford v. McElvey*, 2 Spear (S. C.), 225, 230; *Watkins v. Dean*, 110 Yerg. (Tenn.) 327; *Carlton v. Cameron*, 54 Tex. 72, 77. To make only a posthumous disposition of property. *Walker v. Jones*, 23 Ala. 448, 456; *Elmore v. Mustin*, 28 Ala. 309, 313; *Kinnebrew v. Kinnebrew's Adm'r*, 35 Ala. 628, 640; *Symmes v. Arnold*, 10 Ga. 506; *Wellborn v. Weaver*, 17 Ga. 267, 276; *Johnson v. Yancey*, 20 Ga. 707; *Olney v. Howe*, 89 Ill. 556; *Reed v. Hazleton*, 37 Kan. 321; 6 Am. Prob. Rep. 534; 15 Pac. Rep. 177; affirmed, *Hazleton v. Reed*, 46 Kan. 78; 7 Am. Prob. Rep. 268; 26 Pac. Rep. 450; *Cover v. Stem*, 67 Md. 449; 6 Am. Prob. Rep. 548; 10 Atl. Rep. 231; *Miller v. Holt*, 68 Mo. 584; 1 Am. Prob. Rep. 199; *Turner v. Scott*, 51 Pa. St. 126, 134; *Frederick's Appeal*, 52 Pa. St. 338, 341; *Frew v. Clarke*, 80 Pa. St. 170; *McGee v. McGants*, 1 McCord (S. C.) 517; *Kinard v. Kinard*, 1 Speer Eq. (S. C.) 256, 263; *Ferguson v. Ferguson*, 27 Tex. 339; *Roberts v. Coleman*, 37 W. Va. 143, 151; 16 S. E. Rep. 482. As when it expressly provides that it shall take effect at such death. *Shepherd v. Nabors*, *supra*; *Walker v. Jones*, *supra*; *Crocker v. Smith*, *supra*; *Dudley v. Mallory*, 4 Ga. 52, 65; *Bright v. Adams*, *supra*; *Arnold v. Arnold*, *supra*; *Sperber v. Balster*, 66 Ga. 317; *Donald v. Nesbit*, 89 Ga. 290; 15 S. E. Rep. 367; *Turner v. Scott*, *supra*; *Armstrong v. Armstrong*, 4 J. Baxter (Tenn.), 257; 1 Am. Prob. Rep. 209. Or that the grantee shall take no estate in the lifetime of the grantor. *Leaver v. Gauss*, 62 Iowa, 314; 17 N. W. Rep. 522. Or when the operative words of conveyance are limited by reference to the time of the grantor's death. *Hester v. Young*, 2 Ga. 49, 81; *Johnson v. Yancey*, 20 Ga. 707; *Reed v. Hazleton*, 37 Kan. 321; 6 Am. Prob. Rep. 532; 15 Pac. Rep. 177; affirmed in *Hazleton v. Reed*, 46 Kan. 78; 7 Am. Prob. Rep. 268; *Miller v. Holt*, 68 Mo. 584; 1 Am. Prob. Rep. 199; *Will of Belcher*, 66 N. C. 51; *Schad's Appeal*, 88 Pa. St. 111; *Wheeler v. Durant*, 3 Rich. Eq. (S. C.) 452; *Kinard v. Kinard*, 1 Speer Eq. 256; *Ragsdale v. Booker*, 2 Strob. Eq. 348. Or by reference to the payment of debts and funeral expenses. *Nichols v. Chandler*, 55 Ga. 369. Or to so much of the property as may be left at the death of the grantor. *Robinson v. Schly*, 6 Ga. 515, 528; *Hall v. Bragg*, 28 Ga. 330, 332; *Nichols v. Chandler*, *supra*; *Kelleher v. Kernan*, 60 Md. 440; 3 Am. Prob. Rep. 417; *Watkins v. Dean*, 16 Yerg. 321. Or when the instrument is delivered to a third person as the agent of the grantor to be recorded and retained by him until after the death of the grantor, then to be delivered to the gran-

tees. *Wellborn v. Weaver*, 17 Ga. 267; *Nichols v. Chandler*, 55 Ga. 369; *Hale v. Joslen*, 134 Mass. 316; *William v. Schatz*, 43 Ohio St. 47; *Prutsmann v. Baker*, 30 Wis. 644. So of a bond. *Carey v. Dennis*, 18 Md. 1. Or if it is not delivered at all. *Donald v. Nesbit*, 89 Ga. 290; 15 S. E. Rep. 367; *Cline v. Jones*, 111 Ill. 563; 5 Am. Prob. Rep. 341. Or when it includes after-acquired property. *Crocker v. Smith*, 94 Ala. 295, 298; 10 So. Rep. 258. Or when it reserves to the grantor the rights of ownership of the property as distinguished from the right to its use and enjoyment. *Walker v. Jones*, 23 Ala. 443; *Kinnebrew v. Kinnebrew's Adm'r*, 35 Ala. 628, 641; *Gillham v. Mustin*, 42 Ala. 365, 367; *Robinson v. Schly*, 6 Ga. 528; *Kelleher v. Kernan*, 66 Md. 440; 3 Am. Prob. Rep. 417; *Roberts v. Coleman*, 87 W. Va. 143, 151; 16 S. E. Rep. 482. But not because it reserves the right of revocation. *Hall v. Burkam*, 59 Ga. 346, 354.

An instrument creating a right or interest which passes on the execution of the instrument though the time of enjoyment or enforcement is postponed to the death of the maker, is a deed or contract not a will. *Kinnebrew v. Kinnebrew's Adm'r*, 35 Ala. 628, 640; *Gillham v. Mustin*, 42 Ala. 365; *Jordan v. Jordan's Adm'r*, 65 Ala. 301, 305; *Daniel v. Hill*, 52 Ala. 430, 436; *Hall v. Burkam*, 59 Ala. 349, 354; *Jordan v. Jordan*, 65 Ala. 301, 305; *Trawick v. Davis*, 85 Ala. 342, 345, 5 So. Rep. 83; *Bunch v. Nicks*, 50 Ark. 367, 6 Am. Prob. Rep. 576, 7 S. W. Rep. 63; *Bass v. Bass*, 52 Ga. 531; *Sperber v. Balster*, 66 Ga. 317, 321; *Worley v. Daniel*, 90 Ga. 650, 652, 16 S. E. Rep. 98; *Shackleton v. Sebree*, 86 Ill. 616; *Reed v. Hazleton*, 37 Kan. 321, 6 Am. Prob. Rep. 532, 15 Pac. Rep. 177; *Burlington University v. Barrett*, 23 Iowa, 60, 72; *Will of Diez*, 50 N. Y. 88, 90; *Jaggers v. Estes*, 2 Strob. Eq. (S. C.) 343, 378; *Wall v. Wall*, 30 Miss. 91; *Crain v. Wright*, 114 N. Y. 307, 21 N. E. Rep. 401; *Diefendorf v. Diefendorf*, 132 N. Y. 100, 30 N. E. Rep. 375; *Beebe v. McKenzie*, 19 Or. 296, 7 Am. Prob. Rep. 538, 24 Pac. Rep. 236; *Wheeler v. Durant*, 3 Rich. Eq. (S. C.) 452, 455; *Williams v. Sullivan*, 10 Rich. (S. C.) 219.

Whether such postponement be by the reservation of a life estate in the maker. *Adams v. Broughton*, 13 Ala. 731; *Wilks v. Greer*, 14 Ala. 437; *Summerlin v. Gibson*, 15 Ala. 406; *Elmore v. Mustin*, 28 Ala. 309; *Daniel v. Hill*, 52 Ala. 430, 436; *Hall v. Burkam*, 59 Ala. 349; *Jordan v. Jordan*, 65 Ala. 301; *Trawick v. Davis*, 85 Ala. 342, 345, 5 So. Rep. 83; *Cumming v. Cumming*, 3 Ga. 460, 484; *Jackson v. Culpeper* id. 569, 573; *Robinson v. Schly*, 6 Ga. 515, 527; *McGlawn v. McGlawn*, 17 Ga. 234; *Bass v. Bass*, 52 Ga. 531; *Worley v. Daniel*, *supra*; *Cates v. Cates*, 135 Ind. 272, 34 N. E. Rep. 257; *Wyman v. Brown*, 50 Me. 139; *Brown v. Smith*, 52 Me. 141; *Alexander v. Burnet*, 5 Rich. L. (S. C.) 189, 194. Or by limiting an instrument containing words of present conveyance to take effect on such death. *Golding v. Golding's Adm'r*, 24 Ala. 121; *Kinnebrew v. Kinnebrew's Adm'r*, 35 Ala. 620; *Bunch v. Nicks*, 50 Ark. 367, 6 Am. Prob. Rep. 576; *Shackleton v. Sebree*, 86 Ill. 616; *Abbott v. Holway*, 72 Me. 298; *Williams v. Sullivan*, 10 Rich. (S. C.) 219; *Jaggers v. Estes*, 2 Strobh. Eq. (S. C.) 343, 375; *Walls v. Ward*, 2 Swan. (Tenn.) 648, 654; *Swarts v. Bushart*, 2 Head. (Tenn.) 561.

So an instrument evidencing a present indebtedness or obligation is a contract and not a will, though the time of performance or payment is postponed

to the death of the maker. *Bristol v. Warner*, 19 Conn. 7, 18; *Kirkpatrick v. Pyle*, 6 Houst. (Del.) 659; *Parker v. Coburn*, 92 Mass. (10 All.) 82; *Krell v. Codman*, 154 Mass. 454, 28 N. E. Rep. 578; *Carnwright v. Gray*, 127 N. Y. 92; 27 N. E. Rep. 835; *Meek's Appeal*, 97 Pa. St. 813. Or though the payment or performance is to be by the executors or administrators of the maker. *Krell v. Codman*, *supra*; *Shields v. Irwin*, 3 Yeates (Pa.) 389; *Meek's Appeal*, *supra*; or out of his estate. *Johnson v. Yancey*, 20 Ga. 707.

An instrument may in one part and as to some of the property be a deed or contract, and in other parts and as to other property, testamentary in its character. *Kinnebrew v. Kinnebrew's Admr.* 35 Ala. 628; *Jordan v. Jordan's Adm'r* 65 Ala. 301, 308; *Dudley v. Mallory*, 4 Ga. 52, 64; *Robinson v. Schly*, 6 Ga. 515; *Burlington University v. Barrett*, 23 Iowa, 60, 73; *Reed v. Hazleton*, 37 Kan. 331, 6 Am. Prob. Rep. 532, 15 Pac. Rep. 177.

If the verbiage of an instrument or the dispositions which it makes are testamentary in their character, it may be entitled to probate as a will, though some of its provisions were operative as those of an irrevocable contract *inter vivos*. *Taylor v. Kelly*, 81 Ala. 59; *Kinnebrew v. Kinnebrew's Adm'r* 55 Ala. 628; *Bolman v. Overall*, 80 Ala. 451, 6 Am. Prob. Rep. 58; *Smith v. Tuit*, 137 Pa. St. 341, 7 Am. Prob. Rep. 478; 17 Atl. Rep. 995; *Tuit v. Smith*, 137 Pa. St. 35, 7 Am. Prob. Rep. 493; 20 Atl. Rep. 579. Irrevocable and enforceable when founded on a valuable consideration. *Bolman v. Overall*, *supra*; *Smith v. Tuit*, *supra*. A paper in the form of a will executed in consideration of personal services rendered or to be rendered, or other valuable consideration, and delivered to the devisee or legatee therein named may constitute an irrevocable contract. *Bolman v. Overall*, 80 Ala. 451, 6 Am. Prob. Rep. 590, 2 So. Rep. 624; *Smith v. Tuit*, 127 Pa. St. 35, 7 Am. Prob. Rep. 498; 20 Atl. Rep. 579. But it has been held that an instrument in the form of a will devising land in consideration of a covenant by the devisee for the payment of an annual income is to be construed as forming one instrument with the covenant and to be irrevocable. *Johnson v. McCue*, 34 Pa. St. 180.

PEPPER'S ESTATE. PEPPER'S APPEAL

[148 Pennsylvania State, 5.]

PROBATE OF CODICIL APART FROM WILL

Though a codicil might possibly be admitted to probate apart from the will if it were shown that the testator intended it to operate separately from the will, a codicil making no disposition of any property and merely appointing an executor who has since died, cannot be so admitted to probate.

A. T. Freedley and John G. Johnson, for appellants.

Dwight M. Lowrey and James Parsons, for appellee.

PAXSON, C. J.—This was an appeal from the order of the court below, admitting to probate a codicil to the will of the late Charles Rockland Pepper. The testator died in Paris, France, on March 7, 1890. In the fall of that year a French woman, named Sybilla Erb, the appellee, presented to the register of wills of Philadelphia certain papers purporting to be a probate of the will of said Charles Rockland Pepper by the authorities of Paris, and at the same time presented her own petition to said register, praying that ancillary letters of administration might be issued to herself here. This petition was accompanied by a codicil to said will, executed by the said Pepper while in this country, dated June 9, 1887. The alleged will bears date May 16, 1887. The codicil is as follows: "Philadelphia, June 9, 1887. I, Charles R. Pepper, do make and declare this a codicil to my will, made in Paris, May —, 1887, and I do hereby nominate and appoint my uncle, George S. Pepper, executor of said will, with full power and authority to do all things necessary and expedient in the premises.

CHARLES ROCKLAND PEPPER.

Witnesses :

FREDERICK STAMGER.

JOHN S. FROMME."

By the alleged will the testator gave nearly the whole of his estate to Sybilla Erb, the appellee. It was conceded that the relations between them were meretricious. The admission of the will and codicil to probate was resisted by the heirs and next of kin of the testator, who reside here where most of his real estate is situate. The appellants claimed that Philadelphia was the place of principal administration, and not of merely ancillary administration, as the legal domicile of the testator was within this commonwealth; that the will was not valid under the laws of Pennsylvania; and that, in view of the meretricious relations existing between the parties, the will, in the absence

of proof, was *prima facie* invalid, as presuming undue influence. It was further contended that the alleged will was not signed at the end thereof, as required by the statute of this state. None of these questions was determined by the register, as the appellee by her petition requested that officer to certify to the Orphans' Court, under the acts of assembly, that a difficult and disputable fact had arisen, and that the proceedings should be certified by him to that court. They were so certified as to the will and upon the application of the appellee, the Orphans' Court appointed an examiner to take testimony. While the examiner was engaged in taking testimony the appellee filed her petition in said court, demanding that the codicil to the will should of itself, and apart from the will of which it formed a part, be admitted to immediate probate, or, in the alternative that it should be delivered to the appellee for the purpose of being probated in France. The respondents filed their answers, denying the right of the petitioner thus to split the will into different portions, and obtain an immediate probate of one portion while proceedings were pending on the other and main portion thereof at her own request. The appellee filed her replications to these answers. The court below decided the matter upon the petition and answers, and admitted the codicil to probate pending the contention over the will itself.

George S. Pepper, the executor named in the codicil, was deceased at the time it was admitted to probate. Under such circumstances, it is difficult to see the administrative advantage of probating the codicil. Letters testamentary could not issue to a dead man, and letters of administration *cum testamento annexo* would be a novelty without a will to annex. The codicil made no disposition of property. Standing alone, therefore, it could be of no use to any one. That it may have a most important bearing upon the future disposition of Mr. Pepper's estate is a proposition that was doubtless fully appreciated by the astute counsel engaged in this contention, and is doubtless the cause of the fierce battle that has been waged over it.

The codicil was executed in strict compliance with the law of this state. It is attested by two subscribing witnesses. If, therefore, it is a part of the will, as I shall endeavor to show, it is the last portion, and being signed by the testator at the end thereof, no objection could well be taken to it as a Pennsylvania will because not properly executed. Moreover, as it was written by his uncle, and executed in this country, with the ocean between the testator and the appellee, it may have an important bearing upon the question of undue influence, should that question be formally and seriously raised hereafter. It is also to be noted that the codicil is a republication of a will made in Paris in May, 1887. If the will offered to the register here is that will, it is not difficult to see how a great contention should arise over what is apparently a small matter.

That a will and a codicil, though written on separate pieces of paper, and executed at different times, constitute but one instrument, and that the codicil is as much a part of the will as if written therein, is elementary law. It is an addition to a will, and when properly executed, becomes a part of it. No authority is needed for so obvious a proposition. This brings us at once to the question, can a will be probated in sections?

The appellee, to sustain this proposition, refers us to *Hood's Estate*, (21 Pa. St. 106.) An examination of that case shows that no such question as the one we are now considering was either raised or decided. In *Hood's Estate* it appeared that the testator was a native of this country, but removed to Cuba when under twenty years of age, and engaged in business there. He became a naturalized citizen of Cuba, and resided there all his life, making an occasional visit to the United States and Europe. He died while on a visit to Paris. He made a will in Cuba, which, however, does not appear to have been proved there. He also executed several codicils in Philadelphia, where he owned some property. The Philadelphia codicils were executed in conformity with the law of this state, and after his death the codicils, with a copy of the Cuban will attached, were pro-

bated as one instrument before the register of wills in Philadelphia. The whole contention was as to the domicile of the testator, and whether certain legacies given by said will and payable out of the profits of his sugar plantations in Cuba, were subject to collateral inheritance tax by our laws.

Lord Howden's Case, (43 Law J. Prob. & M. 26), is against the appellee on this subject. There the testator left two wills, one in English form for his property in England, and one in the French form for his property in France, and had subsequently made two codicils to the English will. The English will referred to his French will. Just as Mr. Pepper's codicil refers to his Paris will. The court in England refused probate of the English will and codicils until the French documents were produced and proved with it as part thereof, with an intimation that authenticated copies of the document relating to the French will might be supplied if the original could not be produced.

In re Harris, (L. R. 2 Prob. & Div. 83), [1870], the testator executed a will relating to property in Tasmania, and also, subsequently, another will, relating to property in England. The English will was admitted to probate in England without reference being made to the Tasmania will. The latter was presented for probate in Tasmania, but was rejected on the ground that the document was only a part of the will of the deceased; that, of whatever number of executed documents the will consists, they cannot be separated, and must all be proved together, as together constituting one will. The court sustained this position, and revoked the probate previously granted of the English will alone, and held that probate should issue of both papers as "together constituting the will of the deceased." The same doctrine is laid down in (*Re Crawford*, L. R. 15 Prob. Div. 212, (1890); *In re de la Saussaye*, L. R. 3 Prob. & Div. 42, (1873); *In re Honeywood*, L. R. 2 Prob. & Div. 251, (1871.)) Indeed, our attention has not been called to any well considered case which sustains the contrary view.

It is possible that cases may arise where a codicil could

be probated separate from the will. But it would be necessary to show that the testator intended it to operate separately from the will. In (Redf. Wills. c. 7, § 25, par. 16), it is said: "It is for the party applying for a probate of a codicil alone to show that the deceased intended that it should operate separately from the will." This quotation from Redfield is cited and approved in *Youse v. Forman*, (5 Bush, 337), where the object was to sustain a codicil apart from a revoked will, and the court said: "The codicils to the main paper, all being in the margin thereof, must share the fate of the body of the will, for these all depend upon and are intimately interwoven with it, and neither being sufficiently independent to be upheld and executed as a testamentary paper. Nor does either indicate any intention of the testator to have either of them sustained independent of the main body of the wills." To the same effect is *In re William T. Pinckney*, (1 Tuck. 436.)

There is nothing in the will and codicil of Charles Rockland Pepper to show that he intended the codicil to act as an independent paper. Indeed, it is impossible that it should do so, for standing alone, with the executor named therein in his grave, it is as harmless a paper as could be compressed in the same number of lines.

We are unable to see what the question of domicile has to do with the case as now presented, except in the single matter of the mode of proof of the will. It may become a question of importance hereafter, in the distribution of the estate. The bulk of testator's estate, much of it being realty, being situate in Pennsylvania, his will is entitled to be probated here. It is a muniment of title. Moreover, in order to carry the real estate, it must be executed in conformity to our law. This will and codicil, taken together, constitute a valid Pennsylvania will in form; and if it is the voluntary act of the testator, free from any improper influence, it is a good will here, when properly proved, whatever may be its *status* in France.

The learned court below was of opinion that the codicil could be separately probated because the testator owned

real estate in this jurisdiction. This would be an unanswerable argument if it were applied to the whole will, but, as applied to the codicil as apart from the will, it has little force, because the codicil has no force. The decree, as it stands, must be reversed, and the case sent back, in order that the question of the probate of the whole will may be passed upon by the proper tribunal.

The decree is reversed, at the cost of the appellee.

The decision in the principal case is supported by the weight of authority. The general rule is that a codicil is, at least, *prima facie* dependent on the will and the revocation of the will by destruction or mutilation operates as a revocation of the codicil. *Grimwood v. Cozzens*, 2 Sw. & Tr. 364; *In re Dutton*, 3 Sw. & Tr. 66; *Youse v. Forman*, 5 Bush. (Ky.) 837. But in a case in which the will appointing executors had been executed on six sheets, by signing at the end of each of the first five sheets and at the foot of the will on the sixth sheet, a codicil written at the back of the last sheeting containing an appointment of executors being thereafter executed, the testatrix subsequently cutting off her signatures at the end of each of the first five sheets and drawing her pen through her signature at the foot of the will, it was held sufficient evidence that she intended to revoke the will but not the codicil, and probate was granted for codicil alone. *In Goods of Harris*, 3 Sw. & Tr. 485; 10 Jur. N. S. 684. A paper commencing "This is a codicil to my last will and testament," no other will being found and there being no evidence that any had been executed, was held entitled to probate as a will. *Goods of Grieg*, L. R. 1 T. & D. 72; *Goods of Clements* (1892), Prob. 254.

CHARLES U. COTTING vs. ANNA DE SARTIGES *et als.*

[17 Rhode Island, 668.]

POWER OF APPOINTMENT—EXECUTION BY GENERAL BEQUEST—
CONFLICT OF LAWS—INTENT.

The question whether or not a general devise or bequest operates as an execution of a power of appointment possessed by the testator is to be determined by the law governing the instrument creating the power, not by that of the domicile of the donee, nor by that of the jurisdiction in which the will was executed.

In Rhode Island a general devise or bequest will not operate as an execution of such a power in the absence of anything to show an intent to execute it. Such intent cannot be inferred from the fact that the testator may be presumed to have known of the existence of the power, and that the bequests in the will slightly exceeded the amount of his own estate.

BILL in equity by Charles U. Cotting against Anna de Sartiges and others for instructions and for the administration of a trust.

William P. Sheffield and *John E. Parsons*, for complainant.

Meddleton S. Burrill, *John E. Burrill*, *George Labrisville* and *Francis B. Peckham*, for respondents, heirs of Mrs. Bourne.

H. B. Clossen and *John E. Parsons*, for executor of Rice.

STINESS, J.—The complainant, trustee under the will of Mary M. Bourne, late of Newport, deceased, brings this bill, practically a bill for instructions, for the distribution of the trust fund, and the case is submitted on bill, answer, and proofs. The will was dated September 30, 1879, and admitted to probate in Newport, January 16, 1882. The testatrix bequeathed one-sixth of her residuary estate to the complainant in trust for the benefit of her grandson Charles Allen Thorndike Rice during his life, and upon his decease to transfer and pay over the same to his issue, if he should leave any, as he should appoint “by will or instrument in the nature thereof, executed in the presence of three or more witnesses; and, if he leaves no issue, to and among such persons, and upon such uses and trusts, as he shall so appoint;” and, in default of such appointment and issue, to and among those who should then be heirs at law.

The grandson died in New York, May 16, 1889, without issue, leaving a will executed in England, September 17, 1881, which was duly probated in New York, where he was domiciled at his death. The will did not specifically dispose of the trust fund, which was subject to Mr. Rice’s appointment, nor make any mention of it. The complainant is

both trustee under the will of Mrs. Bourne and executor of the will of Mr. Rice. In the latter capacity he claims the right to receive and distribute the fund as one which passes by appointment to the legatees under Rice's will. On the other hand, the heirs of Mrs. Bourne contend that there is a default of appointment, and so, under her will, the fund goes to them. The issue now raised, therefore, is whether there has been an execution of the power by the general residuary clause of Mr. Rice's will. Upon this issue our first inquiry must be by what law the execution of the power is to be determined. It is admitted that both in England, where the will was executed, and in New York, where the donee of the power was domiciled, there are statutory provisions to the effect that a general devise or bequest will include property over which the testator has power of appointment, and will operate as an execution of such power, unless an intention not to execute the power shall appear by the will. If, therefore, the question is to be determined either by the law of England or New York, the power has been executed. Clearly, the mere accident that Mr. Rice's will was executed in England while he was temporarily there awaiting a steamer cannot control its operation by impressing upon it the law of the place where it was made. It was neither the domicile of the testator, nor the *situs* of the property, nor the forum where the question comes for determination. *Caufield v. Sullivan* (85 N. Y. 153). The property in dispute being personal property, which, strictly speaking, has no *situs*, the question must be decided either by the law of New York, the domicile of the donee of the power, or of this state, the domicile of the donor. The will is a Rhode Island will. It disposes of property belonging to a resident of Rhode Island. The trustee under the will is, in effect, a Rhode Island trustee, and jurisdiction over the trustee and the fund is here. The fund in question belonged to Mrs. Bourne, and never belonged to Mr. Rice. True, he had the income from it for life, and power to dispose of it at death,—practically the dominion of an owner,—and yet it was not his.

The fund, then, being a Rhode Island fund, disposable under a Rhode Island will, it follows naturally and necessarily that the fact of its disposition must be determined by Rhode Island law.

The question is not what intent is to be imputed to the will of Mr. Rice, but what intent is to be imputed to the will of Mrs. Bourne. She authorized a disposition of her property by an appointment, and it is under her will that the question arises whether an appointment has been made. Her will is to be adjudged by the law of her domicile. So far as assumptions of intent may be made, it is to be presumed she intended the appointment to be made according to the law of her domicile, and not by the law of New York or England, or any other place where the donee of the power might happen to live. It is not the fact of Mrs. Bourne's ownership of the property which points to the law of this state as the criterion, but the fact that her will is the controlling instrument in the disposition of the property. Precisely this question arose in *Sewall v. Wilmer* (132 Mass. 131), where Judge GRAY remarked that the question is singularly free of direct authority. In that case a Massachusetts testator gave to his daughter a power of appointment of certain property. The daughter lived in Maryland, where she died leaving a will devising all her property to her husband, but making no mention of the power. In Massachusetts this was an execution of the power, but in Maryland it was not; and the question arose, which law should govern? It was held that the will of the father was the controlling instrument, and hence that the law of his domicile was to apply. The same decision was made in *Bingham's Appeal* (64 Pa. St. 345), which is cited in *Sewall v. Wilmer* with approval. In England, also, it has been held that the validity of the execution of a power is to be determined by the law of the domicile of the donor of the power. (*Tatnall v. Haukey*, 2 Moore, P. C. 342; *In re Alexander*, 6 Jur. [N. S.] 354.)

The principle on which these cases proceed is that to which we have already alluded, viz., that the appointer is

merely the instrument by whom the original testator designates the beneficiary, and the appointee takes under the original will, and not from the donee of the power. The law of the domicile of the original testator is therefore the appropriate test of an execution of a power. The case of *D'Huart v. Harkness* (34 Beav. 324, 328), apparently holds the contrary, but, we think, only apparently. In that case property was held under an English will, with power of appointment, by will, in a woman domiciled in France. She died leaving a holograph, which was valid as a will in France, but not in England. Under the will act, it was admitted to probate in England, as a foreign will, which gave it all the validity of an English will. The probate in England was held to be conclusive that it was a good will, according to English law; and, being a will, it executed power. The case was really decided by the law of England. While there are numerous decisions upon the general rule that a will is to be governed by the law of the testator's domicile, such decisions are not to be confounded with the present question,—which testator is the one to be considered in the case of a testamentary power? We know of no case which applies the law of the domicile of the donee of the power without reference to that of the donor. For these reasons we think the law of the domicile of the donor of the power should control, and hence that the law of Rhode Island must govern in this case.

What is the law of Rhode Island relating to the execution of a power? In *Phillips v. Brown* (16 R. I. 279; 15 Atl. Rep. 90), the general rule of construction, laid down by Kent, both as to deeds and wills, that if an interest and a power co-exist in the same person, an act done without reference to the power will be applied to the interest, and not to the power, was examined and followed. The same rule was also followed in *Grundy v. Hadfield* (16 R. I. 579; 18 Atl. Rep. 186); and in *Brown v. Phillips* (16 R. I. 612; 18 Atl. Rep. 249). In *Matteson v. Goddard* (Index, H. H. 98; 21 Atl. Rep. 914), it was held that a general residuary clause in a will did not execute a subsequently created power of

appointment. While those cases are not decisive of this one, the reasoning upon which they rest is equally applicable, viz., where nothing appears to show an intent to execute a power the court cannot infer an intent to do so. This was the almost uniform rule prior to the adoption of statutes upon this subject. In New York and in England it was thought that the rule often defeated the intention of testators, who probably intended to dispose of everything they had power to dispose of; and so acts were passed which carried property over which one had a power of appointment, by a general gift of his own property, unless an intention not to execute the power appeared. We do not see that the reason upon which such statutes are based is conclusive. It is equally open to conjecture that one who means to execute a power will signify in some way an intention to do so. If a computation could be made, it would doubtless appear that in the execution of powers a large majority of wills make proper reference to the power. The statute gives an arbitrary direction, against which, it seems to us, the reason is stronger than for it. The rule already recognized in this state is as applicable to wills as to deeds, and, in our opinion, it should be so applied. The same rule is laid down in *Mines v. Gambrill* (71 Md. 30; 18 Atl. Rep. 43); *Hollister v. Shaw* (46 Conn. 248); *Funk v. Eggleston* (92 Ill. 515); *Bilderback v. Boyce* (14 S. C. 528); and cases cited in our previous opinions. The same rule also prevailed in England, New York and Pennsylvania prior to the passage of statutes. In Massachusetts alone was a contrary rule adopted by the court. The law, therefore, has been practically uniform, except as it has been changed by statutes. It is urged that these statutes show a tendency of opinion which the court should follow by adopting the rule of the statutes. The opportunity to make law is alluring, but it tempts beyond the judicial path. As our province is to declare law, rather than to make it, we deem it our duty to adhere to the rule which is commended to us by reason and precedent, until, as elsewhere, it shall be changed by legislative authority. If such a rule be the wiser one, the legis-

lature can enact it; but, outside of a statute, it is hard to see upon what ground a court can decree an intention to execute a power, when in fact no such intention is in any way evinced.

Applying to this case, then, the rule that to support an execution of a power something must appear to show an intent to execute it, we come to the inquiry whether such an intent appears. To solve this, we must look to the will itself, and not to extrinsic facts, except as they enter into and give color to the will. In the will there is no reference to the power, but it is urged that an intention to execute the power is to be inferred from its contents and the circumstances of its execution. It is claimed that Rice's relations with his grandmother were so intimate as to raise a presumption that he knew the contents of her will, especially in view of the fact that his bequests exceeded the amount of his own estate. Rice's will was made at Liverpool, pursuant to a suggestion from the complainant that, owing to the will of his grandmother, he ought not to cross the ocean without making his will. He received \$625,000 outright under his grandmother's will, besides the income of one-sixth of the residuary for life, with the power of appointment. If he knew of this power, it is most natural that he would in some way have referred to it. If he knew the amount absolutely bequeathed to him, or expected a large bequest, it would account for all the legacies in his will. After he knew of the power of appointment, he did not change his will. Perhaps his mind so dwelt upon the legacy of \$625,000 that he gave no thought to a possible appointment of one-fifth of that amount in the residuary clause; or perhaps, after hearing of the power, he intended some time to make a disposition of it. But, however it was, he gave no sign as to the power. The fact that at the time of his death his estate was somewhat less than his bequests is not significant; for evidently he was not a close financier, and gave little heed to the depreciation of his estate. The deficiency, however, is not so marked as to raise a presumption in favor of the execution of the power, even

if we could properly look to that fact for that purpose. This and several other interesting legal questions have been raised and ably presented upon the point of intention, but we do not deem it necessary to pass upon them, inasmuch as we do not find from the facts any sufficient or satisfactory evidence of an intention to execute the power. We therefore decide that the fund in question did not so pass by appointment under the will of Mr. Rice, and therefore belongs to the heirs of Mrs. Bourne, according to the terms of her will.

Decree accordingly.

In *Blount v. Walker*, 28 S. C. 545; 6 S. E. Rep. 558, it was held that a power created by the will of a resident of South Carolina, to appoint "by last will and testament duly executed," could be exercised only by a last will and testament executed according to the laws of South Carolina, and that a will executed according to the laws of the domicile of the donee, but failing to comply with those of South Carolina, was not a valid exercise of the power. A writ of error was dismissed by the Supreme Court of the United States on the ground that no federal question was involved. 184 U. S. 605; 10 Sup. Ct. Rep. 606. But in New York it has been held that a will made in accordance with the law of the state where the donee resides is sufficient as an execution of a power of appointment as to personalty. *Betts v. Betts*, 4 Abb. N. C. 817.

STEVENS vs. FLANNAGAN *et al.*

[131 Indiana, 122.]

CONTRACT PAYABLE TO HEIRS—ENFORCEMENT—PAROL AGREEMENT—PRIVITY OF CONTRACT.

In a contract for the conveyance of land by a father to one of his sons providing for the payment of the purchase price to the heirs of the father after his death, and reciting that the vendee is one of such heirs, the word heirs is used in the sense of children and the purchase money is not payable to the father's administrator.

An action on such a contract can be maintained by the other children though there is no privity of contract between them and the vendee.

A contemporaneous parol agreement between the father and son for an accounting among the children and an allowance for advancements made, cannot be shown in such an action.

The contract is sufficient though the land is described only by reference to certain recorded deeds.

Interest is properly allowed in the judgment in such an action.

Striking out interrogatories filed by one of the parties under Rev. Stat. Ind. 1881, sec. 359, some of which are relevant to defenses to which demurrers are sustained, and the others of which relate to matters not in dispute, is not prejudicial error.

APPEAL from Circuit Court, Fayette County.

Suit by Mary A. Flannagan and others against Sampson R. Stevens to declare and enforce a vendor's lien. From a judgment for plaintiffs, defendant appeals.

Thos. D. Evans and *Geo. C. Florea*, for appellant.

L. H. Stanford, for appellees.

MCBRIDE, J.—The appellant entered into a written contract with his father, William Stevens, of which the following is a copy: "This agreement, made this 2d day of August, 1877, by and between William Stevens and Sampson Stevens, of Union county, in the state of Indiana, witnesseth: The said William Stevens on his part agrees, in consideration of the sum of fourteen thousand dollars, to be paid by the said Sampson R. Stevens, as hereinafter mentioned, to sell and convey unto the said Sampson R. Stevens about two hundred and thirty-four and 50-100 acres of real estate, situated in Union county, in the state of Indiana. A more particular description thereof will be found at page 213 of Deed Record five, in the recorder's office of said county, being record of deed executed August 16, 1835, by John Harland and wife to William Stevens; and also in Deed Record O, at page 317, in the records of said county, being the first tract of land described in deed then recorded, executed by William Stevens *et al.* to Rudolph Whitmore. And the said Sampson R. Stevens on his part hereby agrees, in consideration of the conveyance to him of said

real estate as aforesaid, to pay therefor the sum of fourteen thousand dollars, as follows, to-wit: Five thousand dollars to the heirs at law of said William Stevens within one year after the decease of the said William, and the sum of twenty-two hundred and fifty dollars annually thereafter to said heirs without interest for four years, until the residue of said \$14,000 is fully paid, all without relief from valuation or appraisement laws: provided, however, that if Nancy Stevens, the wife of said William Stevens, shall survive him, then said \$5,000 first above mentioned, only, shall be paid by the said Sampson R. Stevens, within one year after the death of said William Stevens, to his heirs as aforesaid (excluding the said Nancy Stevens), and the residue of \$9,000 shall not become due and payable until the death of the said Nancy Stevens; upon the happening of which event the said Sampson R. Stevens shall, within one year thereafter, pay \$2,250, and the same amount annually thereafter, until the whole is paid. The said Nancy Stevens is to take no part of said money, as she is provided for hereinafter. The said Sampson R. Stevens is himself one of the heirs, and shall have the right to retain his portion of the said fourteen thousand dollars, *pro rata*, in the order of the payment as aforesaid, and this right shall inure to his heirs, administrators, and assigns, no matter which of the said persons (the said William Stevens or his wife, Nancy) shall die first. And the said Sampson R. Stevens further agrees, in consideration of the conveyance to him of said real estate as aforesaid, by said William Stevens and his wife, Nancy Stevens, to reconvey the same to him for and during the term of his natural life, with remainder over to his wife, the said Nancy Stevens, for and during the term of her natural life, with reversion over in fee simple to the said Sampson R. Stevens and his heirs forever. And in case the said Nancy Stevens shall die before the said William Stevens, her husband, then at his death said real estate shall revert to said Sampson R. Stevens and his heirs in fee simple, forever. In witness whereof," etc.

This suit was brought by certain of the children of said William Stevens upon the contract to collect the portion of the purchase money due, and to have declared and enforced a vendor's lien for the same on the land. A copy of the contract was filed with the complaint as an exhibit.

All of the children were made parties, either plaintiff or defendant. The complaint avers full performance of the contract, except the payment of the purchase money. It is averred that both William Stevens and his wife are dead, the wife having died first, and that the \$5,000 payment provided for is due, and the said purchase money is all unpaid. The complaint also contained a full description of the land. The court overruled a demurrer to the complaint, and the appellant excepted. The appellant filed an answer in abatement, showing that an administrator had been duly appointed for the settlement of the estate of said William Stevens, and was then actively discharging that duty; that he had, as such administrator, inventoried said contract as a portion of the assets of the estate; and that the appellant had paid a portion of the sum due on the contract to the administrator, who was not joined as a party to the litigation. The court sustained a demurrer to this answer, and the appellant excepted. An answer in bar was filed in seven paragraphs. No question is made except on the third, fifth, sixth and seventh paragraphs. The third paragraph of answer pleads payment to the administrator. The fifth paragraph alleged the death of William Stevens, testate, contest of his will, which contest was still pending, and the appointment of an administrator who was engaged in the settlement of the estate; that the estate was indebted in a large amount; that the administrator had taken possession of and inventoried as a part of the assets of the estate the contract sued on, and had collected from appellant the \$5,000, constituting the first payment, and all that was then due; and that further administration in the estate was necessary.

The sixth paragraph alleged that the contract was never delivered, or its delivery ever authorized, by said William

Stevens to any of his heirs, nor to defendant, and that when it was executed said William Stevens had no heirs. The seventh paragraph rests upon an alleged contemporaneous parol agreement or understanding between the parties to the contract, the effect of which would be to require an accounting among the beneficiaries and an allowance for alleged advancements to several of them.

Demurrers were sustained to all of these answers, and these rulings, as well as the rulings on the demurrer to the complaint and the plea in abatement, are assigned as error.

The appellant insists that the complaint is bad because the contract contains no description of the land, and is, for that reason, void. So far as this objection is concerned, the ruling of the trial court may be sustained upon several grounds. It is, however, only necessary to refer to two or three familiar and elementary propositions which amply vindicate its correctness. That is certain which may be made certain.

The description of land in a deed is sufficient if it furnishes the means by which the land can be identified. (*Rucker v. Steelman*, 73 Ind. 396; *Scheible v. Slagle*, 89 Ind. 323; *Thain v. Rudisill*, 126 Ind. 272, 26 N. E. Rep. 46.) If the deed refers to another instrument for the purpose of identifying the land, the contents of such instrument are to be considered as part of the deed. (*Insurance Co. v. Grim*, 32 Ind. 249; *Wallace v. Furber*, 62 Ind. 103.) That which would be a sufficient description of the land in a deed is sufficient in a contract for a deed. The reference in the contract to the recorded deeds is sufficient to require that they be read in conjunction with the contract.

It is not claimed that the descriptions in the recorded deeds were not full and complete.

The appellant also insists that the complaint is bad because it does not aver the insolvency of the appellant. Such averments were not necessary. A vendor's lien may be declared or foreclosed without reference to the insolvency of the debtor. The authorities cited lend no support to the contention of the appellant. They only hold that

the vendor's lien is not an original and absolute charge on the land, but only an equitable right to resort to it in case there be not sufficient personal estate. (*Martin v. Cauble*, 72 Ind. 67-75, and cases cited.)

The demurrers to the plea in abatement and to the third and fifth paragraphs of answer present the same question.

The appellant contends that the claim for purchase-money belonged to the estate, and was properly inventoried by the administrator, and might properly and legitimately be paid to him. As we understand his argument, it is, in effect, that while the contract in terms provides for payment to the heirs of William Stevens, he could, while living, have no heirs; that no one could acquire any vested interest in it until after his death, for the reason that his heirs could not be known until that time; and that of necessity, therefore, it belonged to him until his death, his possible heirs having a mere contingent interest therein until that time.

While it is true that the word "heirs" has in law a fixed and technical significance, and a man cannot in that sense, while living, have heirs, it is clear to our minds that, as used in this contract, the word was not used in that sense. The aim of courts in the construction of contracts should be to ascertain and enforce the intention of the parties. The word "heirs" may be, and frequently is, construed to mean "children," when it is plain that it was used in that sense. This frequently occurs in the construction of wills. (*Shimer v. Mann*, 99 Ind. 190, and authorities cited; *Jones v. Miller*, 13 Ind. 337; *Rapp v. Matthias*, 35 Ind. 332.)

The rule, however, is not limited to the construction of wills. Where, in a deed or contract for the conveyance of land, the word "heirs" is used, coupled with other explanatory words, showing that it was the intention by its use to designate or describe a class of persons, rather than that it should receive its strict technical interpretation, the courts will give to it a construction conforming to the manifest purpose of the parties. This question is fully con-

sidered in the case of *Mining Co. v. Beckleheimer* (102 Ind. 76, 1 N. E. Rep. 202.)

The contract recites that "the said Sampson R. Stevens is himself one of the heirs." This is entirely consistent with the construction which treats the word "heirs" as descriptive of a class of persons then in being, and then capable of being ascertained and designated with certainty. It is, however, inconsistent with the idea that the parties were referring to the heirs proper, who could have no existence as such until after the death of William Stevens. The contract also secures to him, and to his heirs, administrators, etc., the right to deduct and retain from each separate payment of the purchase money his *pro rata* share of the purchase money, whether he survived the father and mother or not. This he or they could do if the construction to which we incline is adopted. It could not be done if the other construction prevails, as in that case his share could not be known until the estate was finally settled and distribution made. In our opinion, the estate has no interest in or claim upon the contract or the purchase money. The administrator had no right to inventory or take possession of it as an asset. Payment to him was unauthorized, and is not a defense.

It is not claimed that the estate is insolvent, or that the disposition of the property in any manner operated to the prejudice of creditors. If such facts were shown, a very different question would be presented. What we have said is decisive of the questions arising on the sixth paragraph of answer. The seventh paragraph, resting, as it necessarily does, on an alleged contemporaneous parol modification of the contract, materially modifying its terms, is so clearly bad that no elaboration is necessary.

It is also contended that the appellees cannot maintain the action against the appellant, because there is no privity of contract between them. Before the adoption of the Code, when law and equity were administered by separate tribunals, privity of contract was essential to the maintenance of the action at law, but in equity a promise of one

person to another for the benefit of a third could be enforced by the latter in his own name. Under our present practice, the right of the third person to maintain his action in his own name has been uniformly recognized. (*Carnahan v. Tousey*, 93 Ind. 561, with authorities there cited; *Leake v. Ball*, 116 Ind. 214, 17 N. E. Rep. 918;) and many other cases.

The conditions of contract, so far as William Stevens was concerned, were fully performed by the conveyance of the land. The appellant thereby obtained the full consideration for his promise to pay the purchase money. It was competent for them to agree upon any person to whom the purchase money should be paid. So far as the rights of the appellees are concerned, there can be no material difference between their rights under this contract and their rights as they would have been if, instead of evidencing the agreement to pay by the written contract, Sampson R. Stevens had executed his notes for the several sums due the several parties direct to them. The only thing remaining to make performance of the contract complete was the rendition of the agreed consideration. The law recognizes the right of the beneficiaries to demand performance, without the formality of any delivery of the contract to them. In equity, there are its holders without that formality, and, as such, they are also possessed of the equitable right to have the vendor's lien declared and enforced. (*Shanefelter v. Kenworthy*, 42 Ind. 501.)

The appellant filed interrogatories with his answers, and asked that the other parties to the litigation, both plaintiff and defendant, be required to answer them under oath. On motion, the court struck them out. The appellant complains of this ruling.

The statute (section 359, Rev. St. 1881) authorizes the filing of interrogatories relevant to the matter in controversy, and the party filing them may require "the opposite party to answer them under oath." Whether the fact that the interrogatories in this case, instead of being addressed to the opposite party, are addressed to all the

other parties, both plaintiff and defendant, would afford ground for striking them out, need not be decided. It is enough to say that, with the possible exception of three, they were not relevant to any matter in controversy, as they relate to the advancements assumed to have been made to certain of the heirs. The three, which possibly relate to matters involved, relate to matters about which there is no dispute. There was no error in striking them out sufficient to justify a reversal. The error, if any, was harmless.

The appellant also contends that his motion for a *venire de novo* should have been sustained, because the court made no finding as to advancements, and as to amounts paid to the administrator by the appellant. As neither of these matters were legitimately within the issues, it is not necessary to consider whether, if they were, the alleged error could be reached by this motion. Several other questions are discussed, but they are all covered by what we have heretofore said, except the complaint that the court erred in allowing interest. This was not error.

Judgment affirmed, with cost.

SAMUEL J. FOSTER *vs.* ELLA P. SMITH AND OTHERS.

[156 Massachusetts, 379.]

LIFE ESTATE OR FEE—RESIDUARY CLAUSE—DECLARATIONS OF
TESTATOR.

A bequest to testator's wife "to her and her assigns," to use and dispose of, either to sell and convey by deed or to will "without regard to any legacies hereinafter contained," followed by a provision that if at her decease there should be any of the property remaining undisposed of by her will or otherwise, giving and bequeathing it in the manner set forth in the succeeding clauses, conveys the entire estate to the wife under Pub. St. Mass., chap. 127, § 24, it not clearly appearing that a less estate was intended to be conveyed.

A bequest of certain household goods and \$8,000 "together with the residue of the goods and chattels not hereinbefore named, and \$2,000 more should there be that amount left after the disposal of the remaining estate of my deceased husband," is not a residuary clause passing all the property not needed to pay charges and satisfy other legacies, and does not entitle the legatee to any portion of the proceeds of the sale of the husband's real estate, except so much, if any, as may be necessary to make up the \$5,000.

The intentions of testatrix cannot be shown by her declarations.

Case removed from Essex county on bill for construction of will of Eleanor Perry, deceased.

Wm. Choate and W. F. Dana, for plaintiffs.

H. P. Moulton and V. Wright, for respondent, *Ella P. Smith*.

Boyden & Geddings, for respondents, *W. E. Perry* and others.

BARKER, J.—The case involves the construction of the will of Eleanor Perry, who died in 1889, and incidentally the will of her husband, James Perry, who died in 1876. Mrs. Perry's heirs at law and next of kin were two brothers, a sister, and the four children of a deceased brother. Her estate consisted of about \$3,600 in money and securities, and an undivided fifth of certain lands which came to her from her father and mother; of about \$9,700 in money and securities, and seven parcels of land, which she took under the will of her husband; of about \$965 in money and securities which she had herself acquired; and in some household furniture and similar goods and chattels, the source of her ownership of which is not stated.

The first question is whether the estate given to her by the will of her husband was absolute, or only for her life, with power of disposal by deed or will. The will of James Perry, after appointing his wife executrix, and directing her to pay his debts and funeral expenses as soon as she shall find it convenient, proceeds as follows: "And as to my worldly estate, and all the property, real, personal, or

mixed, of which I shall die seised and possessed, or to which I shall be entitled at the time of my decease, I devise, bequeath, and dispose thereof in the manner following; to-wit: 1st. I give, devise and bequeath to my beloved wife, Eleanor Perry, all my real and all my personal estate of every kind and description, to her and her assigns, for her to use and dispose of in any way she may think best, either to sell and convey by deed or to will the same, without regard to any legacies hereinafter contained. But at the decease of my said wife, if there should be any of my said property, real or personal or both, which she has not disposed of by will or otherwise, then my will is that said residue or remainder of my said estates I devise and bequeath as follows, to-wit." Then follow eleven devises and legacies to individuals, succeeded by the following provisions: "If, at the decease of my said wife, there should not be property enough to pay the before-named legacies in full, then each is to receive their proportional part according to their respective legacies. But, if there should be more property at the decease of my said wife than the legacies herein amount to, then it is to be divided in proportion to their legacies, to the amount in the aggregate of two thousand dollars." These are all the provisions of the will, except the usual formal commencement and the usual conclusion.

Whether this will gave to the testator's widow the full ownership of his property, or only a life interest with power of disposal is to be determined by ascertaining from the whole will the intention of the testator, and by giving it effect so far as it does not contravene the rules of law. But as held in *Kent v. Morrison* (153 Mass. 137; 26 N. E. Rep. 427), if the testator intended to give absolutely a fee simple, he cannot attach to it a quality or condition inconsistent to such an estate. He cannot say that, although the devisee shall hold the property in fee simple after it has vested, yet if he does not convey it in his lifetime, or devise it by will, it shall not descend as his property, but shall be considered as the property of the testator, and pass as part of his estate. Examining the will, the indications which point

most strongly to the view that the testator did not intend to confer absolute ownership upon his wife are the absence of strict words of inheritance in the clause making provision for her, and the provisions for the disposal of the residue or remainder of his estate after her decease. If the words used in making the provisions for Mrs. Perry were the operative words of a conveyance of land at common law, they would give to the grantee no more than a life interest, with power of disposal. But, since used in a will, they may, if so intended, confer absolute ownership, and under our statute are to be so construed, unless it clearly appears by the will that the testator intended to convey a less estate. (Pub. Stat. ch. 127, § 24.) So that the question is whether it clearly appears by this will that the husband intended to give a less estate. In addition to the circumstances noted, some weight in the same direction may be given to the clause which states that it is "for her to use," and to the insertion of the powers to dispose of the property, all of which would have been unnecessary if the testator had supposed that he was making her the absolute owner. Looking at the subsequent provisions of the will, we find, first, a devise of land without any words of inheritance or limitation, next a gift of lands and money to one "and her heirs and assigns forever," and next a devise of lands and a pew in the Baptist meeting-house, to one "to hold during his natural life, * * * to hold and improve during his natural life, and after him to go to his nearest heirs." In addition there are separate pecuniary legacies, in two of which the formula used is, "I give, devise, and bequeath to, * * * to her and her heirs," and in the others, "to her and heirs forever." These provisions show that the usual technical expressions used in the creation of life estates and fees simple were not unknown to the person who drafted the instrument, though upon the whole will it is very doubtful whether he was acquainted with their technical meaning, and whether, in adopting or rejecting them in any particular provision, the testator can be fairly supposed to have acted with knowledge of their precise effect.

The whole instrument gives the impression that it was not drafted by one skilled in the use of legal phraseology. In the outset, it expresses a desire to dispose of all the testator's estate; but it is clear that this is not done upon any theory of its meaning, except that which gives the absolute ownership of the whole to his wife. The first devise of real estate is without words of inheritance, yet the remainder in that parcel is not disposed of. The testator had several parcels of land which he does not specifically devise. His will contains no general residuary clause, while the excess in value of his personalty above the amount necessary to pay all his legacies was more than the \$2,000 by which the legacies were to be increased if there should be more property at the death of his wife than the amount of the legacies. Upon the whole, it seems impossible to say what degree of learning dictated the selection of the terms used, and it must be doubtful what inferences should be drawn from language which may or may not have been used with an understanding of its technical sense. As already stated the testator at the outset declares his intention to dispose of all his property; and this favors the supposition that he meant to give the absolute ownership to his wife, by which construction alone has his purpose been effected. He had made her his executrix; and the statement that the property is "for her to use," and the insertion of the power of disposal may, like his insertion of words of inheritance in his bequests of sums of money, have been due to an over anxiety to make it certain that the property should be wholly her own. So, too, the provisions for disposing of the property at her decease may, consistently with her full ownership, be accounted for upon the theory that the testator was ignorant of the doctrine which forbade him to attach to her estate the inconsistent quality that, if undisposed of by her, it should go as directed by his own will. Upon the whole, we are of opinion that it does not clearly appear by the will that the testator intended his wife to have less than all the estate which he could lawfully devise; and, applying the statute referred to,

we construe the devise to her to have been in fee, and hold that his subsequent provisions for the disposition of the property upon her death, are inconsistent with her estate, and of no effect.

Assuming that Eleanor Perry was the absolute owner of the property which came to her under the will of her husband, it is not difficult to arrive at the construction of her own will. The principal question is as to the meaning of the eighteenth clause, which makes provision for Ella P. Smith. It is contended by her that she is entitled under it to the whole residue of the personal property after payment of the charges of administration and the satisfaction of the other legacies given by the will, and that she is also entitled to have all the real estate which came to the testatrix from her husband, and of which the testatrix made no specific devise, sold, and the entire proceeds paid to her. The clause is as follows: "I give and bequeath to Ella P. Smith, wife of Weldon Smith, my best bed and mattress, best sofa, camphor trunk, two flag-bottomed chairs, set of china, twelve teaspoons, four tablespoons, butter knife, a sugar spoon, one-quarter part of my bed linen, and three thousand dollars in money, together with the residue of the goods and chattels not hereinbefore named, and two thousand dollars more, should there be that amount left after the disposal of the remaining real estate of my deceased husband."

Ella P. Smith was a legatee in the will of James Perry, before mentioned, to the amount of \$3,000. By the previous articles of her own will the testatrix had given to the other legatees of her husband who were living, the several sums of money and parcels of land named in his will, for each to take upon her death. James P. Day, to whom her husband had devised the High street lot, without words of inheritance, had died without issue in the year 1888; and his father, who was not of her husband's blood, was his heir. She devised this lot to six of her husband's nieces and a nephew. Anna F. Day, to whom her husband's will gave the Hale street lot in fee, and \$200 in money, had

died; and Mrs. Perry devised that lot and the same sum of money to the daughter of Mrs. Day. In addition to these provisions the testatrix had by the previous articles given to two nieces of her husband, not mentioned in his will, \$200 each, and to several persons, some of whom were her own relatives, and not mentioned in her husband's will, articles of household furniture and utensils, including two quarter parts of her bed linen.

The will does not anywhere profess to dispose of the whole estate of the testatrix, and it is clear that her oral declarations, of which evidence was admitted *de bene*, cannot be resorted to to explain her intention. (*Tucker v. Society*, 7 Met. [Mass.] 188; *Weston v. Foster*, id. 297; *Warren v. Gregg*, 116 Mass. 304; *Denfield v. Smith*, 156 Mass. 265; 30 N. E. Rep. 1018.)

We think it clear that the clause under consideration cannot be construed to be a residuary clause, passing the money and securities of the testatrix not needed to pay charges and to satisfy other legacies, and that it makes no specific charge upon real estate for the benefit of Mrs. Smith. If the words "residue of the goods and chattels not hereinbefore mentioned," included money and securities, it would carry the whole and make the specific mention of the sums of \$3,000 and of \$2,000 unnecessary. The words plainly refer only to articles of household or personal use, such as had been before named in this and in the earlier clauses of the will, and not to money or securities for money. *Dole v. Johnson* (3 Allen, 364), and cases cited. The clause does not, in any event, give to Mrs. Smith more than \$5,000 in money. The concluding part of the article, "and two thousand dollars more, should there be that amount left after the disposal of the remaining real estate of my deceased husband," can have no further operation in favor of Mrs. Smith than to make it the duty of the executor to resort to a sale of that real estate, if necessary to enable him to pay to her the full sum of \$5,000. As the pecuniary legacies amount to but \$8,200, while the money and securities of the testatrix, not derived from her

father and mother, amount to over \$10,500, it will probably be unnecessary to resort to a sale of the land. Very likely the testatrix supposed that any part of the property received from her husband, and not disposed of by herself, would pass under her husband's will, and meant to make it certain that Mrs. Smith should have the additional \$2,000 before any of her husband's legatees should have the right to have more than the specific sums given in his will. But the claim that it was her intention, by the eighteenth article, to make Mrs. Smith the residuary legatee of all her personalty not derived from her own parents, and to charge the real estate received from Mr. Perry with an additional \$2,000 for the benefit of Mrs. Smith, is entirely untenable.

To recapitulate, in our opinion Eleanor Perry took an absolute and full estate under the will of her husband, and the provisions of his will directing the disposition of his property at her decease are of no effect. By her own will she intended to give to Ella P. Smith the articles of household use named in the eighteenth article, and all similar goods and chattels not before specifically devised to others, and the sum of \$5,000 in money, if her estate was sufficient, or if, by selling the real estate which had come to her from her husband, and which she had not sold or specifically devised, there should be enough, with the assets of her estate not inherited from her own father and mother, to pay in full that sum, and the bequests given in the first eighteen clauses of her will; and she did not intend to give to Ella P. Smith more than \$5,000 in money. If, in the settlement of the estate, it shall become necessary to sell the real estate which the testatrix received from her husband, and which she did not specifically devise, the executor has power to do so; otherwise, that and any personalty not derived from her father and mother, and not needed for the payment of legacies, debts, and charges, will pass to her next of kin and heirs-at-law, as intestate property, and the executor is to be so advised.

Decree accordingly.

As to the effect of a power of disposition annexed to a devise, see, *Welter v. Walker*, 62 Ga. 142; 1 Am. Prob. Rep. 519; *Stuart v. Walker*, 73 Me. 145; 2 Am. Prob. Rep. 79; *Hospital Trust Co. v. Commercial Bank*, (R. I.), 4 Am. Prob. Rep. 563; *Gibbens v. Gibbens*, 140 Mass. 102; 5 Am. Prob. Rep. 92; *Morford v. Diefenbacher*, 54 Mich. 593; 5 Am. Prob. Rep. 135; *Jones v. Jones*, 66 Wis. 310; 5 Am. Prob. Rep. 306; *Goudie v. Johnston*, 109 Ind. 427; 5 Am. Prob. Rep. 351; *Nash v. Simpson*, 78 Me. 142; 5 Am. Prob. Rep. 357; *Estate of Oertle*, 34 Minn. 173; 5 Am. Prob. Rep. 393; *Walker v. Pritchard*, 121 Ill. 221; 6 Am. Prob. Rep. 381; *Halliday v. Stickler*, 78 Iowa, 388; 7 Am. Prob. Rep. 212; *Little v. Giles*, 25 Neb. 313; 7 Am. Prob. Rep. 312; *Stiles v. Eldridge*, 45 N. J. Eq. 632; 7 Am. Prob. Rep. 373; *Cox v. Wills*, *infra*; *Smythe v. Smythe*, *infra*.

SHUMATE vs. BAILEY *et al.*, APPELLANTS.

[110 Missouri, 411.]

CONSTRUCTION—ESTATE—BEQUEATH.

In a clause directing that after the balance of testator's estate shall be realized it shall be divided in three equal parts, which parts are by the same clause bequeathed, the word "estate" applies to realty as well as personalty, and the word "bequeath" is enlarged by the context to mean "give" or "devise."

APPEAL from Circuit Court, New Madrid county, by the defendants in an action for partition among the heirs and devisees of John Thomas Miller, deceased. The will of said Miller reads as follows :

"I, John Thomas Miller, of Big Prairie, New Madrid county, Mo., being of sound mind and judgment, do hereby execute this, my last will and testament ; and, for the purpose of carrying out the provisions herein contained, do hereby appoint Alfred Sikes, Esq., of Big Prairie, to be my executor and administrator, with full power to him to act in the premises.

First. I desire that my wife, Mary Ann Miller, shall have her life rent interest in all my heritable property.

Second. That she shall receive, and I hereby bequeath to her, the following personal effects belonging to me, viz.:

all my household furniture, kitchen utensils, mule, buggy and harness, cow and calf, corn, oats, and fodder, at my house and farm in Big Prairie.

Third. That out of the readiest funds of my estate she shall be paid \$700.00 (seven hundred dollars), five hundred of which shall be applied to building her house on whatever location she shall choose, the remaining two hundred dollars being for her immediate necessities.

Fourth. That, when the balance (after deducting said payments to my wife) of my estate shall be realized, it shall be divided in three equal parts, one part whereof I bequeath to my said wife, and the remaining two parts to the said Alfred Sikes as curator for my two children, Lelia F. Miller and Cora Ellen Miller; and I direct the said Alfred Sikes to invest said two shares to the best advantage he can for the benefit of my said two children, he paying it over to them, with the accumulations thereon, on their attaining majority, or at their marriage, if that shall sooner happen; and in the event of said children, or either of them dying without lawful issue, then said shares or share shall revert to my heirs-at-law.

Fifth. That my said wife shall be guardian for my two said children, and shall have the exclusive control of them, boarding and providing for them, free of all expense to them, except for clothing and education, which shall be paid out of their own share of my estate.

Witness my hand this twenty-fifth day of January, eighteen hundred and seventy. JOHN T. MILLER."

R. B. Oliver and Wilson Cramer, for appellant.

J. J. Russell, for respondent.

BARCLAY, J. — In this proceeding for partition the trial court adjudged the respective interests of the parties upon the theory that the will of John T. Miller, deceased, (a full copy of which appears in the accompanying statement), did not reach or devise his real estate, and that he died intestate as to such realty. That view was indicated by the

rejection of a declaration of law, tendered by appellants, embodying the converse proposition, to the refusal of which they excepted. No instructions were given; none other refused.

The appellants claim that the will disposed of all his property, real and personal.

The decision of the issue thus raised determines the amount of interest, in the subject-matter of this action, property belonging to each of the parties to the litigation.

In the construction of wills, the intention of the maker, as gathered from the terms he has used to express it, enlightened by the circumstances of his situation, should have paramount force and effect.

This rule is well known and conceded by all here.

Applying it, we see that in the fourth item, the testator undertakes to divide his "estate," "when realized," "in three equal parts," and to dispose of it to his two children and wife, etc. He uses the word "bequeath," but the context enlarges the technical meaning of it to signify "give" or "devise." *Watson v. Watson*, (19 S. W. Rep. 543), [1892, decided at this term.]

The language of that section as well as of other parts of the document, fairly indicates that he contemplated a sale of all his real property, except that set apart for his wife, (the exact nature and extent of whose interest we need not determine, as this appeal does not question the Circuit Court's ruling upon that point), and that the proceeds (after paying the \$700 legacy) should be divided and invested according to the directions in that clause. It was remarked by Chief Justice SHAW in *Godfrey v. Humphrey*, [1837] (18 Pick. 539), that "it has long been held that the devise of all a man's estate, where there are not words to control or restrain its operation, shall be construed, not merely to mean his lands, but the quantity of interest which he has in them, so as to pass an estate of inheritance if he has one. *Carter v. Homer*, (4 Mod. 89)."

In *Hackett v. Com.*, [1883], (102 Pa. St. 505), Judge STERRETT, speaking for the court, held that "the word 'estate'

is applicable alike to real and personal property, and to restrict it to the latter there should be a clear expression of the intention to do so."

The same rule is stated in *Barnes v. Patch*, [1803], (8 Ves. 604), and in *Hunt v. Hunt*, [1855], (4 Gray, 193.)

Reading the will as a whole, we consider its reasonable and natural construction to include a disposition of the testator's entire estate, both in his real and personal property.

The only controversy in the present record is upon that subject.

We think the learned trial judge was mistaken in ruling that the will did not dispose of the realty.

The judgment is reversed, and the cause remanded, with direction to proceed to ascertain the several interests of the parties in the proceeds of said land, according to the principles above indicated.

SHERWOOD, C. J., and BLACK and BRACE, JJ., concur.

The word "bequeath" although strictly applicable only to personalty will when necessary to effectuate the intent of the testator be construed as synonymous with devise. *Dow v. Dow*, 36 Me. 216; *Allen v. White*, 97 Mass. 504; *Lamb v. Lamb*, 131 N. Y. 227; 30 N. E. 133; *Montignani v. Blade*, 145 N. Y. 111; 39 N. E. Rep. 719; *Lasher v. Lasher*, 18 Barb. (N. Y.) 106, 109; *Kibler v. Miller*, 57 Hun, 14; 10 N. Y. Supp. 375; or with "devise and bequeath." *Laing v. Barbour*, 119 Mass. 523; and "devise" as synonymous with "bequeath." *Ladd v. Harvey*, 21 N. H. 514, 528; and the word "surplus" will be construed as applying to real estate, *Lamb v. Lamb*, *supra*, so will the word "property." *Blaisdell v. Haight*, 69 Me. 306; 1 Am. Prob. Rep. 311; and "effects," *Page v. Foust*, 89 N. E. 447; 8 Am. Prob. Rep. 433.

CHARLES E. WARREN, Administrator in Equity, *vs.* MARY A. PRESCOTT and Others.

[84 Maine, 488.]

ADOPTION — LEGACY — LINEAL DESCENDANT.

An adopted child may take a legacy given by will to one of its adopted parents dying in the life-time of the testator, being a lineal descendant within the meaning of Rev. St. Me. c. 74, § 10, providing that a legacy shall not lapse by the death of the legatee before the testator, but shall go to his lineal descendants.

REPORT from Supreme Judicial Court, Somerset county.

Bill in equity by Charles E. Warren, as administrator, with the will annexed of Martha H. Wright, deceased, against Mary A. Prescott and others, to obtain a judicial construction of the will, Charles H. Brick, one of the legatees, having died in the life-time of the testatrix, leaving an adopted daughter, but no issue.

Merrill & Coffin, for plaintiff.

Walton & Walton, for defendant Mary A. Prescott.

Heath & Tuell, for defendant Alice P. Brick.

WALTON, J.—The question is whether an adopted child can take a legacy given to one of its adopting parents, and thus prevent the legacy from lapsing, when the legatee dies before the testator. There is no doubt that a child born in lawful wedlock can so take. But, in this particular, does an adopted child possess the same right? We think so. With two exceptions, neither of which is applicable to such a case, an adopted child becomes, “to all intents and purposes, the child of his adopters, the same as if born to them in lawful wedlock.” Such is the express language of our statute in relation to the adoption of children. (Rev. St. c. 67, § 35.)

The exceptions are—*First*, that an adopted child shall not inherit property expressly limited to the heirs of the

body of the adopters; and, *secondly*, that an adopted child shall not inherit property from their (the adopters') lineal or collateral kindred by right of representation. (Rev. St. c. 67, § 35.)

It is plain that neither of these exceptions is applicable to the question now under consideration. They relate to the right to inherit as heirs-at-law, and not to the right to take under a will. To illustrate, we will suppose that one of the adopting parents is possessed of an estate expressly limited to the heirs of his body. By virtue of the first exception, an adopted child cannot inherit—that is, cannot take as an heir-at-law—this estate, or any portion of it. It must go to those to whom it is expressly limited. But an adopted child may rightfully inherit an estate not so expressly limited. With respect to such an estate, he must be regarded as a child, an heir, and a lineal descendant of his adopting parents, the same as if he had been born to them in lawful wedlock. By force of the second exception, an adopted child cannot be regarded as an heir-at-law of his adopting parents' kindred. By adoption, the adopters can make for themselves an heir, but they cannot thus make one for their kindred. To this extent, the two exceptions named operate as a limitation upon the rights of an adopted child. But in all other particulars he is the child, the heir, and a lineal descendant of the adopting parents, to all intents and purposes, the same as if he had been born to them in lawful wedlock. And within the rights and powers thus conferred upon him, and without infringement of either of the exceptions referred to, an adopted child may take a devise or legacy given by will to one of his adopting parents, and thus prevent the devise or legacy from lapsing in case the parent dies before the testator, precisely the same, and with the same limitations, as if he were a child born to such parent in lawful wedlock.

In such a case, a child born in lawful wedlock does not "inherit" the devise or legacy from his parents' kindred. One who takes under a will does not "inherit." To inherit is to take as an heir-at-law, by descent or distribution. To

take under a will is not to inherit; and, when an adopted child takes a legacy given by will to one of his adopting parents, he does not take as an heir-at-law of the parent's kindred. He does not "inherit" the legacy from the testator. He takes as a lineal descendant of the legatee, by force of the statute. (Rev. St. c. 74, § 10.) Not as a lineal descendant by birth, but as a statutory lineal descendant, and as lawfully in the line of descent as if he were placed there by birth.

It is as competent for the legislature to place a child by adoption in the direct line of descent as for the common law to place a child by birth there. And that is precisely what the legislature has done, and what it undoubtedly intended to do, when, in strong and emphatic language, it declared that a legally adopted child becomes, to all intents and purposes, the child of the adopters, the same as if he were born to them in lawful wedlock, with the two exceptions named, neither of which, as we have already seen, is applicable to such a case. This conclusion is, in our judgment, as indisputable as a mathematical demonstration. We cite, not as directly in point, but as having a bearing on the question, *Ross v. Ross*, 129 Mass. 243; 37 Am. Prob. Rep. 321; and *Humphries v. Davis*, 100 Ind. 274; 50 Am. Prob. Rep. 788.

Our opinion, therefore, is that Alice P. Brick, the adopted daughter of Charles H. Brick, is entitled to the estate, real and personal, given to the latter by the will of Martha H. Wright, and which the said Charles H. Brick would have taken if he had survived the testatrix; and as the question was new, and the parties seem to have acted in good faith in taking the opinion of the court, the costs of litigation, including the moderate counsel fees, may be paid by the administrator, and charged to the estate in his administration account.

Bill sustained.

PETERS, C. J., and VIRGIN, LIBBEY, EMERY, and HASKELL, JJ., concurred.

Rights of adopted child.—The tendency of the courts is to concede to an adopted child, so far as is consistent with the statutes of the respective states, all the rights of one born in lawful wedlock. Thus it is said: "The law fixes the status, and from the status courts must determine the correlative rights of parent and child thus created." *Humphries v. Davies*, 100 Ind. 274, 8; *Paul v. Davis*, id. 422, 424. "A child adopted by husband and wife jointly, is placed in substantially the same position as that of a natural child, and when the child takes this place there are long settled rules which will determine the rights of all the interested parties, and there is neither confusion nor uncertainty." *Krug v. Davis*, 87 Ind. 590; *Davis v. Krug*, 95 Ind. 1. A child so adopted occupies towards the second wife the same position as a child by the first marriage, in determining her interest in the husband's estate. *Markover v. Krauss*, 132 Ind. 294; 81 N. E. Rep. 1047. And is considered a child of the husband in determining the wife's interest in his property. *Buckley v. Frazier*, 158 Mass. 525; 27 N. E. Rep. 768; *Moran v. Stewart*, 122 Mo. 295; *Rowan's Appeal*, 132 Pa. St. 292; 19 Atl. Rep. 82.

In *Ross v. Ross* (129 Mass. 248) it was said: "This section (the statute of descents) must be construed as merely laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to inherit. It does not undertake to prescribe who shall be considered a child, or a widow, or a husband, or what is necessary to constitute the legal relation of husband and wife, or of parent and child. These requirements must be sought elsewhere. The words 'children' and 'child,' for instance, 'issue,' in the phrase 'if he leaves no issue' in subsequent clauses, and 'kindred' in the last two clauses of this section, clearly include a child made legitimate by the marriage of its parents and acknowledgement of its birth under section 4 of the same chapter, or a child adopted under the provisions of c. 110 of the Gen. Stat. or c. 810 of the Statutes of 1871." This language was cited with approval in *Fosburgh v. Rogers* (114 Mo. 122, 133; 21 S. W. Rep. 82).

A child adopted by a son of the testatrix after her death was held entitled to take under a devise "to such persons as would by the intestate laws be entitled if the son died seised intestate." *Johnson's Appeal*, 88 Pa. St. 346. But under the Alabama statute declaring the adopted child capable of inheriting from its adoptive parent, the supreme court of that state construed the word "inherit" as in the principal case, as applying only to cases of intestacy and therefore held that the adopted child was not entitled to share in a devise to the children of the testator in a will made prior to the adoption. *Russell v. Russell*, 80 Ala. 48.

EX-PARTE in the Matter of the Petition of WILLIAM LEE,
for Administration upon the ESTATE OF SARAH H. LEE,
Deceased.

[76 Maryland, 108.]

ADMINISTRATION — NECESSITY — ESTATE OF MARRIED WOMAN.

A person holding property of a married woman, who prior to about 1892, died intestate leaving no child or other descendant, was protected in delivering the property to the husband without any administration on her estate, Code Md. art. 93, sec. 32, providing that in such case the personal property shall devolve on the husband absolutely and that administration on her estate should not be necessary to pass title to him, unless she was liable in law for debts owing by her.

The provision for administration in case of debts was one for the protection of the husband and the creditors and with which her debtors had no concern.

APPEAL from Orphans' Court of Baltimore city.

In the matter of the petition of William Lee for letters of administration on the estate of Sarah Harris Lee. Appeal from a decree refusing the petition.

D. M. Thomas, L. M. Reynolds, George R. Willis.

Arthur Geo. Brown, for appellant.

ALVEY, C. J.—This appeal is from the Orphans' Court of Baltimore city, and the question is whether the surviving husband of a deceased wife, who died intestate and without children or descendants, and owing no debts, is required to obtain letters of administration upon the estate of his deceased wife, to enable him to collect a chose in action due the wife at the time of her death. The facts of the case are these as presented by the record: Mrs. Sarah H. Lee, the wife of William Lee, the appellant, died intestate on the 24th of December, 1891, leaving no children or descendants; and as it is alleged, and conceded as a fact by the appellant, she owed no debts for which she was liable at law. That at the time of her death she was entitled to certain credits on the books of the Savings Bank of Baltimore; and that, after the death of the wife, the surviving hus-

band made proper demand of the bank for payment, informing the bank of the facts of the case, but this bank refused payment, "upon the ground that it was under no obligation to assume, and was not willing to assume, the risk of there being outstanding debts of the deceased wife, of which the surviving husband might be without knowledge, and required that letters of administration should be taken out on the estate of the deceased wife, in order that payment might be made to her duly-constituted administrator."

The surviving husband then made application to the Orphans' Court, representing the facts by petition, for letters of administration upon the estate of his deceased wife, but the Orphans' Court, by its order of the 30th of January, 1892, refused the application, upon the ground that by the terms of the statute there was no requirement or necessity for administration upon the estate of the deceased wife in the facts as disclosed.

The question thus presented depends upon the terms of the statute law of the state, as it stood prior to the 7th of April, 1892. By the common law, the husband, *jure mariti* became owner of all the personal and real chattels of the wife in possession, and letters of administration were only necessary to enable him to reduce into possession or recover her choses in action; and to these he became entitled absolutely, if reduced into possession in his lifetime, whether before or subsequent to the death of his wife. *Hubbard v. Barcus*, (38 Md. 180.) By the act of 1798, c. 101, subd. 5, sec. 8, as embodied in the Code of 1860, art. 93, sec. 32, it was provided that, if the intestate be a married woman, it should not, as theretofore, be necessary for the husband to take out letters of administration, but all her choses in action should devolve upon her husband in the same manner as if he had taken out such letters: provided, that if he should not, in his lifetime, reduce said choses in action into possession, or obtain judgment thereon, the said choses in action should devolve on her representatives, and administration might be granted accordingly.

This section of the Code of 1860 was re-enacted by the act of 1878, ch. 268, with the additional provision "that in all cases where the husband should be entitled to a life estate only in the property of his wife, upon her death there should be administration on her estate, and the personal property should be held subject to the order of the Orphans' Court, etc. Therefore neither under the act of 1798, as codified in the Code of 1860, nor the act of 1878, was it necessary for the husband to take out letters of administration upon the estate of his deceased wife, where she died intestate and without children or descendants; and the husband was entitled to her personal estate, including her choses in action, under the provision of the Code. In such case it was his right to reduce the choses in action into possession, either by suit or otherwise, without administration. Section 9, subd. 5, of the act of 1798, made section 12, art. 45, of the Code of 1860, and now forming section 13, art. 45, in the present Code, provides "that a husband bringing a personal action to recover in right of his wife after her death may declare specially, setting forth in the usual manner, how the debt or right accrued to his wife, and stating further that by marriage the debt or right devolved on him." No administration was necessary, in a case like the present, to perfect the title of the husband, or to enable him to maintain suit for the recovery of any part of the personal estate of the deceased wife; and it was only where the husband, in his lifetime, failed to reduce into possession the choses in action of the wife, that the law, upon his death, devolved the title to such choses in action upon the representative of the wife, and made administration on her estate proper or necessary.

Thus stood the law until repealed and re-enacted as modified by the act of 1882, ch. 477, now embodied in the present Code as section 32, art. 93. That section, or the part of it that is material to this case, is as follows :

"If the intestate be a married woman, and shall leave no child or children or descendants, all her personal property, including therein all choses in action, shall devolve

upon her husband absolutely; and it shall not, in such case, be necessary for him to administer upon her estate in order to pass title to him, unless she shall be liable in law for debts owing by her; but if the intestate be a married woman, and leave a child or children or descendants, her personal estate, including all choses in action, shall devolve upon her administrator, and the surplus of her estate shall be distributed by the Orphans' Court to the husband for his life, and no longer, and, after his death, then to her children and descendants *per stirpes*; and it shall be the duty of the Orphans' Court granting the said administration to direct the mode in which the said estate shall be invested so as to best secure the rights of children or others interested after the expiration of the life estate," etc.

It is clear from the section of the Code as it stood at the time of the death of the wife, that, if she died intestate, without child or descendants, and owed no debts, all her personal property, including therein all choses in action, would, in the language of the statute, devolve upon her surviving husband absolutely; and in such case no administration was required. It was only where she owed debts that administration was authorized, and this was primarily for the protection and security of the creditors, and, secondarily, for the protection of the husband. The debtors of the estate had no interest in the matter of administration. Payment by them to the husband without administration was and would be a complete discharge and protection to them. The title to the personal property of the wife in such case, including the choses in action, vested *eo instanti* the death of the wife in the surviving husband; and he could or may sue for and recover to his possession, in the absence of an administration, simply as surviving husband, any personal property belonging to the wife at the time of her death. It would be no defense to the debtor, according to the law existing at the time of the death of the wife in December, 1891, that she might possibly owe debts; nor even if it was shown as a fact that she was indebted. The creditors of the wife, if there were any exist-

ing, as means of protection to themselves, might have required her husband, or, in case of his refusal, some other person, to take out letters of administration upon her estate, and to give bond, and to make discovery of the extent of the assets of the estate, as means of satisfaction of their claims. And so the husband, in order to protect himself against liability for debts of the wife greater than the amount of personal assets devolved upon him by the statute, may apply for and obtain letters of administration, or decline in favor of some other person. But if the surviving husband should think proper to pay off all the subsisting debts of the deceased wife in full without administration, it would seem to be clear that, in a case of the wife dying intestate and without child or descendants, he would be fully authorized to do so, and that no administration in such case would be necessary, and, if not necessary, ought not to be granted. At the last session of the legislature, section 32 of article 93 of the present Code was repealed, and re-enacted in the same terms that it was enacted by the act of 1882, ch. 477, with an amendment, or an additional or qualifying clause, inserted. After the clause which declares that "it shall not in such case be necessary for him to administer upon her estate in order to pass title to him, unless she shall be liable in law for debts owing by her," it is then provided: "But no title whatever to such personal property as chuses in action shall pass to said husband when administration is not necessary, except by order of the Orphans' Court declaring the same. Upon application of the said husband the court shall pass an order *nisi*, which shall be published in such manner and for such time as the court, in its discretion, may prescribe, and which, after the expiration of said notice, shall be finally ratified by said court, unless cause to the contrary has been shown."

This act was approved on the 7th of April, 1892, and it went into effect from that date. The new provision inserted into the act by this last enactment has no retroactive operation, and can only operate upon cases that come into existence after the passage of the act as amended. It can-

not divest previously vested rights, or nullify acts done under previously existing law. It can have, therefore, no operation upon the case. Here it is alleged by the husband, with no assertion by any one to the contrary, that the wife at the time of her death owed no debts; and such being the case, as shown by the record, there was no necessity for administration, and no such ground shown as would have justified the Orphans' Court in granting letters of administration upon the estate of the deceased wife.

The order of that court must therefore be affirmed.

CHARLES SHELTON AND ANOTHER *vs.* LEVI HADLOCK.

[62 Connecticut, 143.]

SALE TO PAY DEBTS—CONCLUSIVENESS—ALLOWANCE OF CLAIMS
—ESTATE OF MARRIED WOMAN—MERGER.

- A person claiming to hold lands by virtue of a sale to pay the debts of a decedent must show the existence of the debts and that all the proceedings requisite were had.
- An order for the sale of land to pay debts, made by the Probate Court having jurisdiction of the estate, which order shows the existence of the jurisdictional facts is conclusive, as are also the orders of the court accepting the inventory returned by the appraisers and the return of the proceedings of the commissioners.
- The commissioners appointed by the Probate Court to pass on the claims of the insolvent estate of a decedent have such equitable powers that they can allow a claim against the estate of a married woman based on a contract which though not binding her personally, would be enforceable in equity against her separate estate.
- The allowance of a claim by the commissioners, has the force of a judgment in the application of the assets to the debts of the estate.
- The purchase by the same person of land of a decedent sold to pay her debts, and the life estate thereon of her husband operates as a merger.

APPEAL from superior court, New Haven county.

Action by Charles M. Shelton and another against Levi

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Hadlock to recover real estate. Judgment for defendant. Plaintiffs appeal.

J. C. Chamberlain, N. W. Bishop and C. M. Shelton,
for appellants.

R. S. Pickett, for appellee.

ANDREWS, C. J.—This is a complaint in the nature of dis-seisin, brought to recover the possession of certain premises in the town of New Haven. The plaintiffs claim title to the premises by descent from their mother, Catharine A. Shelton, who died intestate in August, 1866, leaving her husband, Charles T. Shelton, surviving her. He died in June, 1885. Mr. and Mrs. Shelton were married in 1835. They were then domiciled in New Haven, and remained domiciled there until their respective deaths at the dates above mentioned. Mrs. Shelton, at the time of her death, was the owner of the land in question, with other lands in New Haven, all of which was under mortgages executed by her and her husband to the amount of \$8,500, and was also subject to the husband's estate by the curtesy.

The defendant claims that at the time of Mrs. Shelton's death her interest in all of said lands was subject to certain debts legally provable against it to an amount much greater than the whole value of her interest; that such proceedings were had in the Probate Court in the district of New Haven that the whole of her interest was lawfully sold by the order of the Probate Court to satisfy said claims; and that by sundry *mesne* conveyances all the title to the tract of land in question has come to, and is now vested in, him.

The estate which an heir takes by descent in the lands of an ancestor is not an absolute one; it is subject to all the debts and claims which in law or equity may be proved against it. If there are no debts or claims chargeable against the real estate, then the heir takes the whole; but, if the amount of such claims is greater than the value of all the real estate, then the heir has nothing. In any given case, (as, for instance, the present one), where a party

claims to hold the land of an ancestor against the heir by virtue of a sale to satisfy such debts, he must establish the fact that such debts existed, and that all the proceedings required to sequester the land of the ancestor for their payment were had.

The defendant insists that he has established the existence of debts against the estate of Mrs. Shelton, and the regularity and legality of all the proceedings by which her land was sold to pay those debts. He produced on the trial copies from the probate records in the district of New Haven, by which it appears that administration was duly granted on the intestate estate of Catherine A. Shelton; that appraisers were appointed, who returned an appraisal and inventory of her whole estate at \$170, all of which was real estate, which appraisal was accepted by the court; that the estate was represented insolvent, and that commissioners were appointed, who made return that they had allowed claims against the estate to the amount of \$1,459.03, which return of their doings was received and accepted by the court, and made a part of its records; that the court found the debts to exceed the personal estate, and that her estate was insolvent, and ordered all her real estate to be sold to pay the debts; and that, pursuant to such order, the real estate was sold to one Messena Clark, from whom the defendant derives his title to the same.

No evidence outside the commissioners' report, which was offered by the plaintiffs in connection with the rest of the probate records, was introduced or offered to show the nature or character of the claims allowed by the commissioners, or when or under what circumstances they were contracted, or were claimed before the commissioners to have been contracted; and it is found that the plaintiffs had no actual notice of the probate proceedings, or of the conveyances by which the title came to the defendant, until after their father's death.

The Superior Court rendered judgment in favor of the defendant. The plaintiffs appeal to this court, and allege various reasons of appeal, all of which may be included in

the answer to one question, did the court of probate have jurisdiction to order the sale of Mrs. Shelton's real estate? If it did, the judgment is right; otherwise there is error. The plaintiffs make this the controlling question in their brief. They say: "Upon the validity of the decree of that court (that is, the court of probate) ordering the sale, the defendant must stand, if stand he does." And their whole argument stands or falls upon the correctness of this statement.

Jurisdiction, as applied to a court, means the right of exercising the functions of a legal tribunal. The power to hear and determine a cause is jurisdiction.

The statutes of this state have committed the settlement of the estates of deceased persons exclusively to the courts of probate. A section of the statutes commands that "when any person shall die intestate, the court of probate in the district in which the deceased last dwelt shall grant administration of the estate." Other sections point out and provide for the several steps that must be taken, so that the estate shall be settled in a due and orderly manner—as the appointment of appraisers, and their return of the inventory of the estate, and the duty of the court relative to such inventory; and if the estate is represented insolvent, the appointment of commissioners, the duty of the commissioners, and how they are to proceed in its performance, their return of their doings to the court and the proceedings of the court, upon such return—to the end that, in case the debts exceed the amount of the personal property, the real estate may be ordered to be sold to pay the excess.

Mrs. Shelton last dwelt in the probate district of New Haven. She died there intestate. The Probate Court in that district had jurisdiction, by the express command of the statutes, to settle her estate. A comparison of the several steps taken by that court in the settlement of her estate, as they appear in the finding of facts, with the several provisions of the statutes to which reference is made, shows that each of these steps was authorized by some stat-

ute. That court, then, in making all such orders as were necessary in the ordinary settlement of the estate, was acting within its jurisdiction. The decrees of a court of probate on matters within its jurisdiction are as conclusive as the decisions of any other court of record. (*Dickinson v. Hayes*, 31 Conn. 422; *Mix's Appeal*, 35 Conn. 122; *Kellogg v. Johnson*, 38 Conn. 269.)

The appellants, while not denying that the court of probate in New Haven had the general jurisdiction to settle the estate of Catherine A. Shelton, say that the order for the sale of her land was void. They insist that, as the law was in 1866, the court of probate, even in the settlement of an estate over which it had general jurisdiction, could order real estate to be sold only when the debts and charges allowed exceeded the personal estate, and then only for such excess; that the existence of debts and charges exceeding the personal estate is a jurisdictional fact, in the strictest sense, and that, unless the existence of that fact was shown on the face of such an order, the order was void; and that if, upon the face of the order, it was found that this fact did exist, such finding could be shown by extraneous evidence to be untrue, and so the order shown to be void. (*Sears v. Terry*, 26 Conn. 273; *Culver's Appeal*, 48 Conn. 173.)

In the present case the order of sale does not appear in the record. The course of the argument indicates that it was sufficient on its face, and that so it was *prima facie* valid, according to the case just cited.

The reason of appeal upon which the plaintiffs' argument is based is the second one,—that the court erred and mistook the law in deciding that the court of probate was not a court of limited jurisdiction, and that its decrees could not be attacked collaterally. It is difficult, from the facts found in the record, to see how the question could have arisen in the Superior Court as it is presented here. But, giving the appellants the fullest benefit of their claim, and admitting that it was a technical error for the Superior Court to so decide, does it appear that they have suffered

anything from that ruling? They offered no extraneous evidence. In that sense, they made no attack at all. They asked the Superior Court to inspect the other orders and decrees made by the Probate Court in the settlement of Mrs. Shelton's estate, especially the return of the appraisers, and the return of the doings of the commissioners, and to decide therefrom as a matter of law that the jurisdictional facts appearing in the order of sale were untrue. Admitting, again, that this is in the nature of a collateral attack, there is nothing of which the plaintiffs can complain if the Superior Court decided correctly upon that request. In effect, they asked the Superior Court to hold that the return of the appraisers, the doings of the commissioners, and the decrees of the court in accepting those returns, were void, and that the facts therein established furnished no support to the jurisdictional facts found in the order of sale. And they now ask this court to say that the Superior Court erred in not so holding. We cannot agree with the plaintiffs. We think the Superior Court committed no error in this particular. The inventory had been returned to and accepted by the Probate Court. The commissioners had made return of their doings, which had been accepted and approved by the Probate Court. No appeal had been taken from the decree of the Probate Court accepting the inventory, nor from the doings of the commissioners, nor from the decree of the court accepting their doings. All these were decrees within the admitted jurisdiction of the Probate Court. These were decrees which could not be attacked collaterally. Not appealed from, they were and are conclusive. The Superior Court was required to hold them to be true. Being true, they sustained the order for the sale of land.

The whole argument of the plaintiffs, briefly stated, is this: "The record of the Probate Court discloses the fact that Mrs. Shelton was a married woman, with a husband living. Being a married woman, she could not, as a matter of law, contract a debt for which her estate was liable; and that the allowance by the commissioners of a claim

against her estate was not a judgment, but was wholly illegal, and therefore the order to sell her land, based only upon such pretended debts, was void." It is somewhat strained to say that the probate record discloses that Mrs. Shelton left a husband living. That fact is not disclosed in the record of that court, unless the recital in the inventory returned by the appraisers, which valued her real estate "subject to mortgage and the life estate of her husband," is such a disclosure. It appears nowhere else. But, passing this, we think the plaintiffs are mistaken in their claims of law. Mrs. Shelton, although she could not make a contract which would bind her personally, could bind her property, whether it was her separate property or otherwise. If the debts allowed by the commissioners were contracted upon the credit of her estate, then her estate alone would be liable for their payment. Her husband would not be liable. (*Donalds v. Plumb*, 8 Conn. 447; *Imlay v. Huntington*, 20 Conn. 146; *Leavitt v. Beirne*, 21 Conn. 1; *Taylor v. Shelton*, 30 Conn. 122; *Wells v. Thorman*, 37 Conn. 318; 2 Story, Eq. Jur. §§ 1401, 1402.)

While she was living, the creditors would be compelled to resort to a court of equity to appropriate her estate in payment of their debts. After her death, the creditors could reach the same end in the court of probate, through the medium of commissioners on her estate. The commissioners were an equitable tribunal as well as a legal one. Any claim against her estate which could have been supported before an equitable tribunal it was their duty to allow. (*Palmer v. Green*, 6 Conn. 19; *Brown v. Slater*, 16 Conn. 192; *Collins v. Tillou*, 26 Conn. 373; *Litchfield's Appeal*, 28 Conn. 137.)

The debts having been allowed by the commissioners, and no appeal having been taken, that allowance was conclusive that the debts were such as the estate of Mrs. Shelton was holden to pay. The allowance of a claim against an insolvent estate by the commissioners, while it is not a judgment that can be used for any other purpose, is, as against the estate itself, a judgment. It binds the estate,

and becomes the rule for the Probate Court in the application of the assets to the payment of the debts, as fully as a judgment of the Superior Court. (*Loomis v. Eaton*, 32 Conn. 550; *Bailey v. Bussing*, 37 Conn. 349; *First Nat. Bank v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22.)

Another claim made by the plaintiffs is that the life estate in the lands in question, of their father, did not merge in the estate in fee of their mother while both were owned by Messena Clark. Messena Clark purchased the estate of Mrs. Shelton from her administrator, as has been already stated. Mr. Clark also purchased the life estate Mr. Shelton had in the same land from his assignee in bankruptcy. It is stated in 3 Bl. Comm. 177, that "whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated; or, in the law phrase, it is said to be 'merged'—that is, sunk or drowned—in the greater." There is nothing in the case to show why the ordinary effect did not take place as to these estates. There is no error in the judgment appealed from.

The other judges concurred.

As to collateral attack on orders and decrees of Probate Courts, see *Lyné v. Sanford*, *supra*, p. 26; *Estate of Moore v. Moore*, *supra*, p. 100, and note p. 105.

MCPIKE ADMINISTRATOR v. MCPIKE PLAINTIFF IN ERROR.

[111 Missouri, 216.]

ACCOUNTING — CREDITS—ALLOWANCE—RENTS — INTERESTS— PRACTICE.

An administrator is entitled to credit for money paid by him in the lifetime of the intestate, for the clothing and education of the daughter of the intestate, his niece, on uncontradicted testimony that the payment was made.

An administrator is chargeable as such, with money collected by him in another state on a debt due his intestate.

Though under the Missouri statutes an administrator is required to inventory the real estate and under certain circumstances authorized to collect the rents and the proceeds of the sale thereof he is not, as such administrator chargeable for rents or the proceeds of the sale collected by him for land in another state, in the absence of proof that the laws of that state authorized him to collect such rents and proceeds of sale.

Including such rents and proceeds of sale in an annual settlement, is not an estoppel to have them stricken out on the final settlement.

The approval by the Probate Court of a settlement of an administrator is equivalent to the allowance by the court of a credit included in it, previously presented to the court, but of which no formal allowance was made on the record.

An administrator who, with the consent of the heirs, pastures his mules on the land of the intestate of which the heirs have full possession and control, is not chargeable as administrator with the value of the pasturage.

An administrator is not entitled to interests on moneys advanced by him to the estate.

The refusal to strike out objections to a referee's report because the objections were filed one day after the time limited therefor by the order of the court is a proper exercise of discretion.

APPEAL from Circuit Court, Ralls County.

Shields, Wood & McGowan, for appellant.

Biggs & Roy, for respondent.

GANTT, P. J.—Abram McPike died in January, 1873. Henry C. McPike was duly appointed administrator of his estate by the Probate Court of Ralls county, Mo.

This is an appeal from the judgment of the Circuit Court of Ralls county, on his final settlement of said estate, with Jeremiah McPike, who was appointed administrator *de bonis non*, On his final settlement in the Probate Court, the administrator claimed a balance due him from the estate of \$5,079, and there was an approval of this settlement. From this judgment the administrator *de bonis non* appealed to the Circuit Court of Ralls county. The Circuit Court referred the cause to Thomas H. Bacon, Esq., with instructions to take the testimony, hear and determine the matters in dispute, and make full report to said Circuit

Court, in writing, of all the testimony, together with his findings and decisions on the issues of the case.

The referee heard the cause, and the evidence was closed March 9th, 1886, when the further hearing was continued to June 22, 1886. At this last date, the administrator, Henry C. McPike, filed his motion to strike out of his account certain charges he had made against himself for rents and the proceeds of sale in partition of certain real estate belonging to his intestate in Alton, in the state of Illinois, amounting to \$13,990. This motion the referee overruled.

The referee made his report to the Circuit Court of Ralls county, on 6th December, 1886, finding a balance due the estate from H. C. McPike of \$3,425.70. Both sides filed exceptions to this report.

The referee, Thomas H. Bacon, Esq., having been elected judge of the Circuit Court, by mutual consent, called Judge W. W. EDWARDS, of the St. Charles Circuit Court, to hear the exceptions to his report. Judge EDWARDS heard the cause, and rendered judgment for the estate against the administrator, H. C. McPike, for \$23,858.78.

1. The first question which arises upon the rulings of the Circuit Court is the propriety of overruling the administrator's motion to strike out the objections of the administrator *de bonis non* to the referee's report.

The Circuit Court gave each side leave to file exceptions on or before February 1, 1887. The administrator *de bonis non* filed his exceptions on February 2, 1887. The extension of time was a matter within the discretion of the trial judge, and this motion was properly overruled.

2. In his final settlement, the administrator claimed a credit for \$1,246.60, credited July 14, 1873, for the schooling, clothing, and moneys laid out by his intestate in his lifetime, in the education of Ella McPike, now Mrs. Moore. The referee heard this evidence, and allowed this credit. This account was presented in the Probate Court for allowance. James W. Lear appears to have been appointed administrator *ad litem*, and waived notice on it. It was sworn to

by Ella McPike as correct at the time, but no formal allowance was made on the record. On the hearing before the referee, it appears that Miss Ella made a trip to California, in 1872, with the administrator and his family. She testifies he paid her expenses, her dressmakers' bills, in St. Louis; that he paid her school accounts at Monticello, furnished her money, etc. The administrator testified that for five years before her father's death he attended to placing her in school and paying her bills; that he paid the amount of the voucher "C" for her father. No exception was filed to the referee's report allowing this credit, but the Circuit Court disallowed it. The learned judge simply says that the evidence does not seem to justify the credit. This credit was allowed by the Probate Court in the annual settlement. It was again allowed by the referee. The evidence is uncontradicted that the administrator paid this money out for his niece in the lifetime of her father. She testifies that her father did not mean to accept it as a gift; that he was amply able to support her. The law would certainly cast on the father the reasonable education of his daughter.

We have been unable to view this charge with any suspicion. The beneficiary of this estate testifies she received the consideration. At the time this disbursement was first allowed, section 230, Rev. St. 1879, was in force in this state. By that section it was not absolutely essential for the administrator to obtain a credit that it should have been allowed according to law, but he might "produce such proof of the demand as would enable the claimant to recover in a suit at law." Had the Probate Court refused to allow him this credit at that time, he could have made his formal proof for its allowance. It seem to us that the subsequent approval of the settlement with this credit was tantamount to an allowance, and the evidence before the referee not only did not overturn it, but tended to strengthen it.

We think the court erred in setting aside this allowance. To drive this administrator into a court to obtain a judg-

ment now, after the statute of limitation has run, would work an injustice.

3. In his final settlement, the administrator charged himself with the following items :

Jan'y 17, 1874. Cash of S.W. Farber & Co.,	
rent of mill.....	\$750 00
Dec. 29, 1874. S. W. Farber & Co., mill rent.	750 00
April 20, 1875. Farber & Co., mill	2,920 00
May 8, 1875. Mill rent.....	750 00
Jan'y 1, 1877. Rent Alton mill.....	750 00
Dec. 31, 1877. Farber mill rent	750 00
Dec. 1878. Farber mill rent.....	750 00
May, 1880. One-fourth Alton mill.....	6,570 00
	<hr/>
	\$13,990 00
	<hr/>

He moved the referee to strike these charges from his account. The referee declined to do so, and the Circuit Court sustained the referee. That this mill was real estate in the state of Illinois seems unquestioned. No administration on it was had in that state. The testimony is that in a partition proceeding in Illinois the mill was sold by a commissioner, and the proceeds of the sale divided among the owners, Abram McPike's heirs; one-fourth was paid to Henry C. McPike.

The administrator *de bonis non* claims that, inasmuch as the administrator, on his own showing, received this money belonging to the heirs, he is chargeable with it. The administrator, on the other hand, says that he did receive it, but not as administrator; that this bondsmen ought not to be charged with this money, which never was assets in this state.

That the courts have the right, upon final settlement being made, to examine the prior settlements and rectify all errors or mistakes that have been made, by or against administrators, is now settled in this state. (Woerner, Adm'n, §§ 504, 539; *In re Davis*, 62 Mo. 453.)

The mere fact that an administrator has charged himself in an annual settlement with a fund that he has received as trustee, or attorney in fact for the heirs, and not by virtue of his official character, and to which he would and could have no legal right as administrator, will not estop him from asking to strike the same from his accounts on final settlement, nor prevent the Probate Court allowing him to do so. (2 Woerner, Adm'n, § 513, note 6, and cases cited.) It becomes a question of great importance, not only to the administrator and his sureties and the heirs of this estate, but to administrators and beneficiaries of estates generally, as to proper disposition of the rents and proceeds of sale of the Illinois real estate belonging to Abram McPike. An administrator derives his authority to take and administer the assets of his intestate from the laws of the state in which he is appointed, and these laws of necessity have no extraterritorial sanction. (*Naylor v. Moffatt*, 29 Mo. 126; *Cabanne v. Skinker*, 56 Mo. 357; *Scudder v. Ames*, 89 Mo. 522, par. 4; 14 S. W. Rep. 525; *In re Ames' Estate*, 52 Mo. 290; *State v. Osborn*, 71 Mo. 86.)

The property of every person who dies in this state, whether citizen or stranger, is subject to the course of administration provided by our statutes, and is regarded as in the custody of the law for the benefit of all persons interested, *Bartlett v. Hyde* (3 Mo. 490), and in this respect our laws are in harmony with the laws of administration and succession of the various states of the Union.

The laws of Illinois were not placed in evidence. In the absence of such evidence it will be presumed the common law is in force in that state, and that the title to Abram McPike's lands upon his death vested according to the canons of the common law. (*Young v. People*, 35 Ill. App. 363; *Le Moyne v. Quimby*, 70 Ill. 399; *Warren v. Lusk*, 16 Mo. 102; *Houghtaling v. Ball*, 19 Mo. 84; *Meyer v. McCafe*, 73 Mo. 236; *Long v. Long*, 79 Mo. 651.) At common law the administrator had nothing whatever to do with the real estate of his intestate. It descended to the heirs. Accordingly, at the common law, and in those states generally

where the common law has been adopted, and only modified to the extent of permitting a sale of the lands to pay debts, it has generally been held that, where an administrator came into the possession of rents from the realty or the proceeds of sale, he was chargeable therefor individually as a trustee or trespasser, but not in his character as administrator. (*Newcomb v. Stebbins*, 9 Metc. [Mass.] 540; *Wilson v. Unsell's Adm'r*, 12 Bush. [Ky.] 215; *Head v. Sutton*, 31 Kan. 616; 3 Pac. Rep. 280; *Belcher v. Branch*, 11 R. I. 226; *Walker's Appeal*, 116 Pa. St. 419; 9 Atl. Rep. 654; *Rodman v. Rodman*, 54 Ind. 444; *Kimball v. Sumner*, 62 Me. 305; *Calyer v. Calyer*, 4 Redf. Sur. 305; *Gregg v. Currier*, 36 N. H. 200; *Scroggs v. Stevenson*, 100 N. C. 354; 6 S. E. Rep. 111; *Byrne v. Hume*, 73 Mich. 392; 41 N. W. Rep. 331.)

In this state, however, our statutes require the administrator to inventory the real estate, and under the orders of the Probate Court he is authorized to lease the real estate, collect the rents, prosecute actions for the recovery of possession, discharge mortgages and other liens, and deliver the property to those entitled thereto, when not needed for the payment of debts. (Chapter 1, art. 4, § 69; article 5, §§ 93, 94; and article 7, §§ 129, 130, and article 8, § 145 *et seq.*; *Lewis v. Carson*, 93 Mo. 591; 3 S. W. Rep. 483; and 6 S. W. Rep. 365; *Gamble v. Gibson*, 59 Mo. 592; *Dix v. Morris*, 66 Mo. 514.) In this last case the action was against the sureties on the executor's bond. The condition of the bond was "that he should well and faithfully execute the last will and testament," etc. "It was expressly provided in the will that the executor should have authority to sell all, or any part, of the estate, real or personal." This unquestionably made the real estate assets in his hands, for which he and his sureties were liable. In *State v. Scholl*, (47 Mo. 84), the real estate interest was merely a leasehold of a saloon, a chattel. The administratrix sold it with the fixtures, and her sureties were liable. In holding an administrator chargeable with rents and the proceeds of sale of real estate, received by him in this state by color of his

office, this court has acted with reference to the duties and powers conferred and enjoined by our administration law. The underlying principle of these cases so holding is that the receiving of rents and sale of realty are clearly within the scope of a lawful exercise of his authority as administrator under certain circumstances, and if, without an order of court, he assumes to and takes the rents or proceeds of sale by color of his office, at most it is but a wrongful or irregular exercise of a power delegated to him by law, and he is estopped from pleading his own failure to perform the conditions precedent to the exercise of the grant. The collection of rents and proceeds of sale of realty are within the scope of his duties as administrator. His sureties are presumed to have executed his bond with the knowledge that the due administration of the estate and the law would cast this upon him. In other words, they contract with reference to just such a contingency, and bind themselves to see that he performs the conditions which would render it lawful to take these moneys as assets, and they are liable, if he really does so take them as administrator, but neglects to obtain the sanction of the courts in advance. To this extent there is no difference of opinion in the courts of this state. All agree that the administrator and his sureties are responsible for rents and proceeds of realty received by him in this state by color of his authority as administrator. (*Lewis v. Carson*, 93 Mo. 587; 3 S. W. Rep. 483; and 6 S. W. Rep. 365.)

But assuming as we do that the common law obtains in Illinois, and it being clear that at common law an administrator had nothing to do with real estate, and it being equally well determined and conceded that the statutes of this state have no extra-territorial force, and that the letters of administration granted in Ralls county, Mo., would not, under any state of case, authorize the administrator to proceed into the state of Illinois, sell real estate there situated, or intermeddle with it in any manner, by virtue of his office, if he should go there and obtain it, it cannot be referable to his position as administrator, nor has he any

official responsibility or liability with respect to the moneys so obtained, though chargeable as trustee and trespasser. (Woerner, Adm'n, § 308, note 1, and cases cited.) And his sureties cannot be held liable for property acquired or acts done by him in a distinct capacity. (Amer. & Eng. Enc. Law, § 6, pp. 217, 218, and cases cited; *Gregg v. Currier*, 36 N. H. 200; *McCoy v. Scott*, 2 Rawle, 222; *Gibson v. Earley*, 16 Mass. 280.) And in determining this responsibility to account, this court must keep in mind the effect of charging or crediting the administrator with the proceeds of the real estate in Illinois on the sureties of the administrator, for this court has invariably held the judgments of the County or Probate Courts in administration conclusive on the sureties, except in cases where fraud or collusion is shown. (*State v. Holt*, 27 Mo. 340; *Dix v. Morris*, 66 Mo. 514.)

If, then, the sureties cannot be held for the rents and proceeds of the Illinois real estate, it is because it is not a proper charge against Henry C. McPike, as administrator, for they are responsible for all sums with which he is legally chargeable as such administrator. But the liability of a surety is always to be measured by his covenant, and the accounting for the proceeds of lands in a foreign state is not within the spirit or letter of his obligation. (*Grimes v. Clay*, 4 Litt. [Ky.] 6; *Oldham v. Collins*, 4 J. J. Marsh, 49; *Neely v. Merritt*, 9 Bush, 346; *Speed v. Nelson*, 8 B. Mon. 503.) The evidence of the administrator is that he did not receive these rents or proceeds of the real estate in Illinois as administrator.

The heirs were necessary parties to the partition case. It certainly seems reasonable that he received it as their attorney in fact or guardian *ad litem*, and not as administrator. Our conclusion is that the Circuit Court erred in charging him with said rents that accrued after the death of Abram McPike and the proceeds of the sale of one-fourth interest in said mill, and the referee and the Circuit Court should have sustained the motion to strike out said charges, except as to the charge of \$2,920, April 20, 1875, which we

think was properly chargeable against the administrator under his own evidence. His evidence precludes the idea that this rent was accruing after the death of Abram McPike, and he says "he thinks it was due in some other way than rent." "I think it was an account due A. McPike's estate." Being a mere personal debt, he had a right to receive it, even in a foreign state, and as he did so it became assets with which he was chargeable. The exception to this last item was properly overruled.

4. The next charge made by the referee and sustained by the Circuit Court is the sum of \$4,007, as follows :

Pasturing plantation mules.....	\$405 00
McPike and Johnson $\frac{1}{2}$	2,237 00
Pasturing and feeding 53 young mules.....	1,365 00
	<hr/>
	\$4,007 00
	<hr/>

The referee charged no interest on the amount, but the court did.

Both the referee and the learned circuit judge who tried the case below were impressed with the unsatisfactory evidence upon which they sustained this charge against the administrator. The referee was aided in reaching his conclusion by adopting this rule, that "in such a case, whatever doubts arise must be *prima facie* against the administrator;" whereas the learned circuit judge says: "It is not very plainly seen how, from this evidence, the conclusions have been reached as to the accounts charged under this debit." The testimony on the subject seems to be quite speculative and uncertain. "The theory or process by which the respective amounts were reached is not stated in the report, but the presumption is that the referee found that the value of the feed and pasturage obtained by the administrator from the lands of the estate was the aggregate stated."

The basis of this charge against the administrator is found in an exception made in writing in the Probate

Court, and is as follows: The administrator *d. b. n.* "also objects because the administrator has not charged himself with the amount of corn and hay raised on the estate lands in Ralls county, Twp. 55, R. 5, and fed to the mules and cattle of said administrator for the individual use and benefit and profit of said administrator, and to the injury and loss of said estate, and further that he fails to charge himself with the pasturage of the pasture lands of said estate which were grazed upon and used by said administrator in fattening his individual stock for his individual benefit and to the loss of the estate during the years 1874, '75, '76, '77, '78, '79, '80, and of the value of \$10,000.00."

From the testimony it appears that Abram McPike died in January, 1873, and Henry McPike was appointed administrator. When Abram died, Mrs. Lucy Vardeman and Jerry B. Vardeman were living on the Vardeman land, in her house. Jerry Vardeman was A. McPike's brother-in-law.

All of A. McPike's children, except his daughter, Miss Ella, who was at school, remained with their grandmother, Mrs. Vardeman. Their mother was dead. Mrs. Vardeman had 600 acres, A. McPike 800 to 1,000 acres, and Jerry 289 acres, all adjoining. In the evidence all the lands of the three are called the "Home Place." They were all run under one management.

At various times between 1874 and 1880, Henry McPike sent to this farm mules of his own and of the firm of Johnson & McPike. These mules were partly pastured, and partly fed with grain, and to some extent with hay. They were watered and well cared for by Jerry Vardeman. It is for this feeding and care that this charge is made.

Henry McPike is quite positive in his testimony that he bought the grain from the tenants on the farms of the three owners, and paid them for their grain, and that he paid Jerry Vardeman for the hay. He does not claim that he paid for the pasturage or for the services rendered to him by Vardeman in feeding and watering. The administrator *de bonis non*, who is a son of A. McPike, admits that his uncle Henry did buy some of the tenant's corn that

was fed to the mules; and one-half of the cost of pasturage, feed, and value of the care of the mules of Johnson & McPike was paid to Jerry Vardeman for the heirs of A. McPike; and that he, Vardeman, used this money for the support and maintenance of the entire family, Mrs. V., Jerry V., and the heirs, and in the payment of taxes; and that all the other products of the home place, except what was fed to the mules, were used by the family.

Now it is clear that these lands were not rented by order or direction of the Probate Court. *Prima facie*, then, the administrator had nothing to do with these lands, unless they should be required to pay debts. His own testimony is unqualified that he never took charge of them as administrator, nor assumed to do so; that he gave Mr. Vardeman friendly advice in the interest of the children, because they were his kinsmen. The administrator *de bonis non* is equally clear that it was understood by all the family that "this home place was excluded from the control of the administrator." All agree that Jerry Vardeman had absolute management of it, and Jerry Vardeman admits that he never accounted to the administrator for rents or products received from the farm. Johnson paid him one-half for keeping the mules, and he says Henry asked him what he owed him, and he said, "Nothing." He does say he made no charge because he thought the mules belonged to his deceased brother-in-law, but he also says Henry McPike did not tell him they did.

Giving to all of these witnesses full credence, and imputing to them a desire to tell the truth, and nothing but the truth, which I think this record justifies us in doing, the conclusion is unavoidable that this was simply a private transaction between Henry McPike and McPike & Johnson and Jerry Vardeman. That it lacks the definite, business-like arrangement of strangers is true, but that Henry McPike understood that Mrs. Vardeman and Jerry and the children were in the full possession and control of these lands cannot be disputed on this record. His offer to pay Jerry Vardeman, his assistance in

making Johnson pay the money to Jerry instead of collecting it himself, his failure to demand any statement of the rents from Jerry, all point in one direction. As the law did not cast upon him the possession, and he did not by color of his office assume it, and those to whom it lawfully belonged were in the actual possession and reaping the benefit of it, it would be contrary to every principle of justice to hold him and his sureties on the theory of rents received. He owed the heirs and Jerry and Mrs. Vardeman for the pasturage. He offered to pay their agent and manager, and he refused to make any charge. Granting that in a court of conscience he might have gone further and paid the heirs for their share of the pasturage, still it was no part of his duty as administrator, and is not the subject of a charge in his accounts. His liability for his individual debts should have been settled in another forum.

As said by Judge WOERNER in his American Law of Administration (section 513): "On principle it would seem to follow from the administrator's liability to the heirs or devisees directly as a wrongdoer or trespasser, or as their agent or trustee, *dehors* his official capacity, and therefore he is not chargeable in his administration accounts with the rents, profits or proceeds of sale of real estate, and it is accordingly held in many states that the Probate Court has no jurisdiction to try the liability of the executor or administrator in respect to real estate not legally in his charge, and that the sureties of the administrator are not bound for the funds so collected." (*Lucy v. Lucy*, 55 N. H. 9; *Head v. Sutton*, 31 Kan. 616, 3 Pac. Rep. 280; *Calyer v. Calyer*, 4 Redf. Sur. 305.) Certainly when the real estate is not legally in his charge, and he does not assume in fact to manage or control it by virtue of his office, and deals in his individual capacity with those who are lawfully in possession, there is no foundation for charging him as administrator, or for the Probate Court assuming jurisdiction to settle their differences.

It follows that, upon the undisputed facts returned by the referee, this charge cannot be sustained.

It was not a contest as to whether Henry C. McPike had collected rents as administrator, nor whether he was in direct possession of the lands on which these mules were fed, as administrator, but whether he had paid what it was worth to pasture, feed, and care for his individual and firm mules, on lands actually occupied and controlled by the heirs, under an arrangement with their uncle and manager, Mr. Vardeman.

No one can doubt that the crops raised on the home place by Vardeman, Mrs. Vardeman, and the heirs, belonged to them individually. They were not turned over to the administrator to pay debts or liabilities of the estate, but for his individual purposes. To permit him, or the heirs either, to put this into his administration account and charge his sureties therefor would be unjust, and establishing a bad precedent.

The remaining objection to the action of the referee and Circuit Court is the refusal to allow the administrator interest on moneys advanced by him to the estate. In this respect there was no error.

It was his misfortune if as indorser or surety he was compelled to pay, in advance of funds of the estate, claims against the estate. When he paid them, he then became the owner of the demand or allowance, and was authorized to retain payment, *pro rata*, with other claims of their class, from funds he might receive, and receive the interest they were bearing. The law will not permit any other rule. It follows, then, that the judgment of the Circuit Court is reversed, with directions to that court to allow the administrator the item of \$1,246.60, paid July 14, 1873, voucher "C" in his second annual settlement, approved by the Probate Court and referee and disallowed by Judge EDWARDS, with interest at the same rate that he is charged on his debits, and to strike from the debits charged against him the sum of \$11,070, the amount of rent received on the Alton mill and the proceeds of sale in partition in Illinois of said real estate, and the interest charged on said sum by the court in its accounting with him; and with the further

directions to strike from the debits or charges allowed against him the sum of \$4,007, charged against him for feeding, caring, and pasturing mules for the administrator and the firm of Johnson & McPike, and the interest thereon also; and to strike out and disallow all commissions allowed on said items, if any, in stating the accounting. Otherwise the judgment of the Circuit Court is approved. The administrator is allowed the costs of this appeal.

PATRICK HIGGINS vs. CENTRAL NEW ENGLAND AND WESTERN RAILROAD COMPANY.

[155 Massachusetts, 176.]

DEATH BY WRONGFUL ACT—ACTION BY ADMINISTRATOR—CONFLICT OF LAWS.

An administrator appointed in the state of the domicile of the decedent is entitled to sue in the courts of that state upon a cause of action which survives, though such cause of action be given, not by common law, but by the statutes of another state, as in the case of other actions founded on the laws of other states.

General Statutes Connecticut 1888, section 1009, giving a cause of action for death by wrongful act is not a penal statute, though the amount of recovery is limited to a fixed sum, and the damages are to be distributed to the husband, widow, heirs or next of kin.

The statute, not being repugnant to the general policy of Massachusetts, and the cause of action being one which under General Statutes Connecticut 1888, section 1008, survives, an administrator appointed in Massachusetts can sue on the cause of action in the courts of that state.

APPEAL by Patrick Higgins, administrator, from the judgment of Superior Court, Hampden county, sustaining a demurrer to his complaint in an action against the Central New England and Western Railroad Company for damages resulting from the killing of his intestate.

W. G. Bassett and J. T. Keating, for appellant.

T. M. Brown, for appellee.

BARKER, J.—The plaintiff's intestate was domiciled in Massachusetts, where the plaintiff was appointed administrator. This being the principal administration, the plaintiff succeeded as well to every right of action of the deceased which survived as to his other personal property. Upon the question whether such an administrator takes a right of action by succession from his intestate, it is immaterial that the right arose under the statute of a foreign state rather than under the common law or the statutes of this state; just as the fact that the intestate's chattels or merchandise had been acquired or were held under the statutes of a foreign state, rather than under the law of his domicile, is immaterial upon the question whether such merchandise or chattels pass to the administrator.

Such an administrator is entitled to the aid of our courts, if they have jurisdiction of the necessary parties, in collecting and reducing into money the property which he takes by succession, whether goods, chattels or choses in action.

Suits brought to enforce rights of action which the deceased had, and which survived and passed from him to his administrator, differ essentially from those which this court refused to entertain in *Richardson v. Railroad Co.* (98 Mass. 85), and in *Davis v. Railroad Co.* (143 Mass. 301; 9 N. E. Rep. 815.) In *Richardson's Case* an administrator appointed here sought to enforce in our courts a cause of action which his intestate never had, which had not passed to the administrator by succession, and which the statutes of another state had caused to spring up at the death of the intestate, and had provided might be brought by and in the names of his personal representatives, for the exclusive benefit of his widow and next of kin. In *Davis' Case* the intestate had a right of action in his lifetime, by the common law of Connecticut, where he was injured; but by

the law of Connecticut his right of action did not survive, and was extinguished at his death, while a penal action created by statute was substituted for it in that state.

In the present case the plaintiff's intestate is alleged to have been instantly killed in Connecticut by the defendant's negligence. It is conceded that the statute of that state makes the defendant liable to pay damages for the injury which caused his death. Can his administrator sue here to recover such damages? The Connecticut statute places in one category "all actions for injury to the person, whether the same do or do not instantaneously result in death," and all actions "to the reputation or to the property, and actions to recover damages for injury to the person of the wife, child or servant of any person;" and provides that all shall survive to the executor or administrator. (Gen. St. Conn. 1888, § 1008.) One evident purpose of the statute was to give to actions for injuries resulting in instantaneous death the same incidents as actions which survive. It is grouped with actions which survive for other injuries to the person, and for injuries to reputation and to property, and all are said to survive. The putting in operation of the negligent or unlawful forces which cause instantaneous death is a wrong to the person killed, which, by more or less of appreciable time, precedes his death. If the law of the country where such a wrong is committed gives to the person killed a right of action, and provides that it shall survive to his administrator, there is no difficulty in considering that the deceased had that right of action at the instant when he was *vivus et mortuus*, and that by express provisions of law it is made to survive and to pass to his administrator. This the statute referred to has plainly attempted to do. As was held in *Davis v. Railroad Co.*, *ubi supra*, it is the right of each state "to determine by its laws under what circumstances an injury to the person will afford a cause of action." Viewing this statute of Connecticut as a whole, it plainly puts such causes of action as the present upon the footing of personal actions which survive, and which are everywhere considered transitory; that is, they

go with the person who has the right of action where he goes, and are enforceable in any forum according to its rules of procedure. If they survive, such actions, like other personal estate, are considered to have *situs* in the place of domicile, and to pass to the administrator there appointed. Viewing the causes of action with which the Connecticut statute deals in connection with the one now sued on, our own statutes of survivorship are similar. There is therefore nothing in the nature of the cause of action, as so far developed, to prevent our courts from entertaining it upon principles generally recognized.

Assuming that the cause of action is one not existing at the common law, but created by the statute of another state, we have seen that it is transitory, and that it survives and passes from the deceased to his administrator. When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other states shall be heard here. These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy or to abstract justice or pure morals, or calculated to injure the state or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we see that, consistently with our own forms of procedure or law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or offends our own policy, or is repugnant to justice or good morals, or is calculated to injure this state or its citizens; or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy; or if, under our forms of procedure, an action here cannot give a substantial remedy,—we are at liberty to decline jurisdiction. (*Blanchard v. Russell*, 13 Mass. 1, 6; *Prentiss v. Savage*, id. 20, 24; *Ingraham v. Geyer*, id. 146; *Tappan v. Poor*, 15 Mass. 419; *Zipcey v. Thompson*, 1 Gray, 243, 245; *Erickson v. Nesmith*, 15 Gray, 221; 4 Allen, 233, 236; *Hal-*

sey v. McLean, 12 Allen, 438, 443; *New Haven Horse-Nail Co. v. Linden Springs Co.*, 142 Mass. 349, 353; 7 N. E. Rep. 773; *Bank v. Rindge*, 154 Mass. 203; 27 N. E. Rep. 1015.)

Applying these rules, we find no sufficient reason for declining to entertain the present action. Our own statutes have in several instances changed the policy of the common law so as to allow damages for death occasioned by negligence. (Pub. St. c. 52, § 17; id. c. 73, § 6; id. c. 112, § 212; St. 1883, c. 243; St. 1887, c. 270, § 2.) The right created by the Connecticut statute is in terms a right to recover "just damages." (Gen. St. Conn. 1888, § 1009.) Neither the fact that the statute creating it limits the amount of the recovery to a sum not exceeding \$5,000, nor that the damages are to be distributed to the husband, widow, heirs or next of kin, makes it a penal action. The effect of such provisions as to the distribution of the damages is to say that they shall not be assets for the payment of debts, and shall not pass by the will of the deceased, but shall be applied to the compensation of the persons who are presumed to have suffered the most by the death of the person injured. Such a right is not unjust, or contrary to good morals, or calculated to injure the state or its citizens. Our courts have jurisdiction of the necessary parties. Looking at the statute creating the right of action as a part of the system of law in force in Connecticut, and considering that, if the action is to be prosecuted here, our rules of law regulating procedure and fixing the elements which are to enter into the assessment of the damages must govern the trial, it is probable that the result will not be exactly the same as if the remedy had been pursued in Connecticut. But we see no such difficulty as to lead us to suppose that injustice may be done to the defendant, and none which ought to make us decline jurisdiction if the plaintiff elects to sue here.

The statutes which create and limit the right of action are found in the provisions regulating civil actions in the courts of Connecticut, and are part of its general system of law. By "the costs and expenses of suit," which, under

section 1009, are to be deducted from the damages before they are distributed, were intended costs of suit allowed under Connecticut laws, and the expenses of the suit exclusive of such costs. These expenses, including those of trials not resulting in a verdict, are a constituent element of the just damages under the Connecticut system. The same system allows exemplary and vindictive damages. (*Murphy v. Railroad Co.*, 29 Conn. 499; *Beecher v. Ferry Co.*, 24 Conn. 497; *Noyes v. Ward*, 19 Conn. 253.) If in the action prosecuted here neither the expenses of the suit nor exemplary or vindictive damages can be recovered, that fact is no hardship upon the defendant. There is no reason why the plaintiff may not be allowed to waive those elements of damage by bringing his action in a forum where they cannot be allowed. It is also a part of the Connecticut system that upon the default of a defendant in such actions the plaintiff has no right to have his damages assessed by a jury, and in practice the assessment is uniformly made by the court alone. (Gen. St. Conn. 1888, § 1106; *Raymond v. Railroad Co.*, 43 Conn. 598.) Upon such assessment in Connecticut, the defendant, to reduce the damages to a nominal sum, may show contributory negligence, or any matter which, if pleaded and proved in bar, would have defeated the action. (*Daily v. Railroad Co.*, 32 Conn. 356; *Carey v. Day*, 36 Conn. 152.) But even if it appeared that the motive for bringing an action here was to insure an assessment of damages by a jury, we cannot perceive in that a valid reason for declining to take jurisdiction.

It is to be noticed that, while the statute upon which the plaintiff founds his claim makes the cause of action one which accrued to the plaintiff's intestate in his lifetime, and provides that it shall survive and pass to his administrator, it does not say in terms that the damages shall or shall not be assets of the intestate estate, but provides that they shall be distributed in a way which may or may not be different from the disposition to be made under our law of the assets of the deceased to be administered. As this intestate was domiciled in Massachusetts, we are not to be taken as now

deciding how any damages which the plaintiff may recover are to be here administered.

Demurrer overruled.

COLUMBUS WATCH COMPANY *et al.* vs. HODENPYL *et al.*

[185 New York, 480.]

ATTACK ON JUDGMENT—EXECUTORS CONTINUING BUSINESS—
EXECUTIONS.

An offer by the defendants to allow judgment to be entered against them for an amount justly due is not such collusion as to give other creditors any right to interfere.

In actions to set aside a judgment as fraudulent on the ground that it was entered on offers to allow judgment, the burden is on plaintiff to show that it was not based on a *bona fide* indebtedness of the defendant to the judgment creditor.

Under a direction to executors to conduct testator's interest in the business carried on by him in a certain firm, only the interest which testator has in the business at the time of his decease, and not his general estate becomes engaged for the debts of the firm.

An execution on a judgment against the surviving member of a firm and the executors of the deceased member whose will provided for the continuance of his interest in the business, is not governed by Code Civil Procedure, New York, § 1825, providing that no execution shall be issued against an executor without leave of the surrogate.

The words "executor" and "executrix" used in connection with the names of such partners are merely descriptive of the persons.

A legatee of a deceased partner who permits her legacy to remain in the business, drawing interest on it, waives her right to payment by the estate and becomes a creditor of the firm.

One loaning money to the firm during the lifetime of testator, who continues the loan after his decease and takes the notes of the new firm for the balance then due is a creditor of the new firm.

APPEAL from Supreme Court, General Term, First Department.

Action by the Columbus Watch Company and others, attaching creditors of Stern & Stern, against A. J. G.

Hodenpyl and others, to set aside certain judgments recovered by defendants against said firm of Stern & Stern, and the executions issued thereon, and to restrain the collection of such executions, on the ground that such judgments and executions were fraudulent and void. From a judgment and order of the General Term affirming a judgment of the Special Term in favor of defendants, plaintiffs appeal.

Franklin Bien, for appellants.

Hays & Greenbaum, for respondents.

GRAY, J.—The plaintiffs were creditors of the firm of Stern & Stern in New York city; and had procured attachments to be issued upon their claims, as set forth in their several actions. They then brought this action for equitable relief, seeking to set aside certain judgments recovered against Stern & Stern, and the executions issued thereon against the property attached, and to restrain the sheriff from paying the executions until they, these plaintiffs, could perfect judgments in their other actions. The grounds upon which plaintiffs base their right to such equitable relief are a fraudulent collusion in obtaining the judgments and the nullity of the executions, for being issued against executors in contravention of the requirements of the provisions of the Code of Civil Procedure. In 1886, Joseph Stern, a member of the firm of Stern & Stern, died, leaving a will, whereby he constitutes his widow, the defendant Dinah Stern, and his partner, the defendant Simon Stern, the executors of his estate, and therein authorized them “to conduct his interest in the business then carried on by him under the firm name of Stern & Stern, in conjunction with his brother, in such manner as they should deem proper, and for such time as they should deem for the interest of his estate.” Thereafter the business of the testator’s firm was carried on by the surviving partner and Joseph Stern’s executors until November 29, 1889. On

that date the judgments complained of were recovered against the firm of Stern & Stern, and executions thereon issued to the sheriff. The trial judge found that each of the judgments was for a debt justly owing¹ by the firm to the party or parties in whose favor the judgment was entered, and nothing which is pointed out by the appellants' counsel would warrant us in saying that the findings were not justified. Indeed, their counsel bases his attacks upon the judgments upon inferences from the methods in which the judgments were recovered, rather than upon anything which amounts to evidence affecting the *bona fides* of the claims of the judgment creditors.

They were entered upon offers made by the defendant firm to allow judgment to be taken for the amount claimed, and of course, in such a sense, they might be called collusive; but, if made to secure the payment of a just indebtedness, the offer to allow judgment to be entered is not a collusion which violates any rule of law, or gives the right to another and less fortunate creditor to interfere. The existence of some other purpose must be shown, which involves the commission of a fraud or a legal injustice upon creditors, to render fraudulently collusive the preference permitted to a creditor in allowing an immediate entry of judgment in his suit. The judgments were all for goods sold and delivered to the firm, with the exception of three, which were for moneys loaned to the firm. These latter judgments were recovered by relatives, and they are particularly the subject of attack.

I see no good reason, nor is any advanced, for disturbing the conclusions reached by the learned justices at the special and general terms. There was some evidence to support the finding as to the *bona fides* of the indebtedness, and there was no proof affirmatively establishing, or even tending to establish, on the plaintiff's part, that the judgments were fraudulent or nonexistent demands. The courts below have drawn their inferences from the testimony given by defendants with respect to the judgments, and we cannot and should not disturb them.

I think, too, that the general term justices correctly held the burden to have been upon the plaintiffs to show that there was no such indebtedness, and that it was not incumbent upon the defendants to establish its existence or *bona fides* until it had been impeached.

The appellants say that the executions issued upon the judgments of the defendants were null and void, and cite section 1731 of the Code, which provides that an execution upon a judgment for a sum of money against an executor is regulated by sections 1825 and 1826 of the Code. Those sections provide that the surrogate, in such a case, must permit the execution to issue by an order, and for the giving of a notice of six days. The judgments, however, were not against the estate of the deceased partner, and were not within these Code provisions. They were upon debts owing by the firm of Stern & Stern, and the executions were not issued against the defendants, who were executors of Joseph Stern, the deceased partner, as such executors. They were partners in the business, and in affixing to the names of Simon Stern and Dinah Stern the words "executor" and "executrix," they were used as descriptive, merely, of the persons. As executors, they were not interested in the business of the firm, otherwise than as the will authorized them to take part in it. The interest in that business which testator had at the time of his decease was continued by his executors, and his general estate was not engaged. The claims of the judgment creditors were contracted either upon loans to or in the course of business with the firm of Stern & Stern, and what was subjected to the hazards of that business was the particular part of the testator's estate invested in the firm's business.

As to such a fund, the executors became copartners, and the debts incurred in the business were claims upon the partnership, primarily, and not upon the testator's estate.

This will differs from that in *Willis v. Sharp* (113 N. Y. 586; 21 N. E. Rep. 705), in that here the testator did not subject his general assets to the hazards of the business, while there the language of the will was so general as to the powers con-

ferred upon the executors to dispose of the whole estate in the conduct of the business as to bind the general estate of the testatrix for the business debts. The right of executors to continue a business in which their testator had been engaged has been the subject of much consideration by the courts, and the rules of construction as to the powers of executors in such cases are well settled. They derive those powers, not from their office, but by virtue of the authority in the will. Such an authority must be explicitly found, and the language of the will must be resorted to, when a question arises as to the nature of the liability which is incurred in the conduct of a business by executors. The question was carefully reviewed in *Willis v. Sharp, supra*, by Judge ANDREWS, and the present case presents no occasion for a further discussion. The direction to the executors in Joseph Stern's will was explicit enough, and nothing appears in the case warranting any other conclusion than that his executors, with respect to the business of Stern & Stern, subjected to its risks only that part of the estate which their testator had left invested in it, and gave to creditors dealing with the new partnership the usual rights of partnership creditors.

The claim of appellants that certain of the judgments were for loans made in the time of Joseph Stern, the deceased partner, and that therefore resort could only have been had to his executors, is untenable.

In the one case a legacy was due to a daughter from her father's estate; but she let it remain in the business, drawing interest upon it. She thereby waived her right to insist upon its payment out of the estate, and elected to become a creditor of the firm; and, being such a creditor, she had the right to pursue her remedy against the firm assets for the recovery of the money loaned. In the other case a loan had been made to the old firm, which was continued with the firm formed upon Joseph's death, and which was reduced in amount from time to time by payments by the the new firm. For the balance due in 1889 she held the firm's note, which was placed in judgment. She had thus

become a creditor of the firm, and, as such, entitled to proceed by judgment and execution in the ordinary way. As all the claims put in judgment were upon an indebtedness of the partnership, the provisions of the Code relied upon by the appellants did not apply, as they undoubtedly would have, had the judgments, to collect which the executions were issued, been recovered upon claims against the estate of the deceased testator.

These views are, in substance, those stated by the learned justice who spoke for the general term, and as the other questions are sufficiently answered in his opinion, I think the judgment appealed from should be affirmed by us, with costs.

All concur.

As to the powers and liabilities of executors in regard to carrying on the business of their testators, see *Brasfield v. French* 2 Am. Prob. Rep. 607, and note 618; *Bennett v. Rhodes* 3 Am. Prob. Rep. 148; *Mattison v. Farnham* 7 Am. Prob. Rep. 214.

As to the powers of executors and administrators to bind the estate by the contracts and the form of judgments and executions against them, see *Rich v. Soles*, *supra*, p. 171, and note, 174.

HELEN B. ANGELL AND ANOTHER, vs. SPRINGFIELD HOME FOR AGED WOMEN AND OTHERS.

[157 Massachusetts, 241.]

BEQUEST OF BANK STOCK—INCOME—USE OF HOMESTEAD AND FURNITURE—RESIDUARY CLAUSE.

Certificates of bank stock bequeathed to testatrix and in her possession, she knowing that the beneficial interest belonged to her though they still stood in the name of the original owner, pass by a bequest of her shares in that bank.

A bequest of the dividends and income of certain stocks to the amount of ten thousand dollars with directions that it be kept as a permanent fund, the income of which only shall be expended, is a gift of the shares, not merely of the dividends and income until they shall amount to that sum.

Such a bequest is a specific legacy carrying all the dividends subsequent to the death of the testatrix.

Under a clause giving the use of testatrix's share of the homestead and furniture, and of all her property left as a residue and remainder, for one year after her decease and as much longer as she shall choose to stay and use the same, to one person; and after the settlement of the estate giving that person the use of three-fifths and to another, two-fifths of the residue and remainder of the estate, the person first named is entitled to the use of testatrix's share of the homestead and furniture as long as she chooses to stay at the homestead, and the rest, residue and remainder in which the two legatees are to share includes all the property except the share in the homestead not needed for the payment of debts and legacies.

CASE reserved from Supreme Judicial Court, Hampden County.

Petition for the construction of the will of Margaret H. Lombard, by Helen B. Angell and Jennie S. Lombard, executors.

Wells, McClench & Barnes, for Home for Aged Women.

T. M. Brown, for Springfield Hospital.

C. L. Long, for defendant Bardwell.

BARKER, J.—This is a bill brought to obtain instructions as to the meaning of the twelfth and fourteenth clauses of the will of one Margaret H. Lombard. The testatrix died on July 23, 1890. We assume, as the contrary is not claimed by any party, that upon any construction of the will her estate is ample to satisfy all her legacies. The first eleven clauses dispose of \$5,100 in legacies, varying in amount from \$100 to \$2,000, and of ten shares of stock in the New York, New Haven & Hartford Railroad, and forty shares of Boston & Albany Railroad stock, and of her wardrobe and keepsakes. The twelfth, thirteenth, and fourteenth clauses are as follows :

“(12) I give the dividends and income of my shares of stock of the following named banks—First National Bank, Second National Bank, Chapin National Bank, and John Hancock National Bank — to the amount of ten thousand dollars, to the Springfield Home for Aged Women, a corporation established by law, and located in said Springfield; and I direct that it be kept as a permanent fund, to be known as ‘The Lombard Fund,’ the income of which only shall be expended ; and I direct that, in the expending of said income, preference shall be given to the care and benefit of old ladies designated and recommended by the pastor for the time being of the Unitarian Church in said Springfield; and I further direct that the said shares of bank stock shall not be sold unless it becomes absolutely necessary. I also give to said Springfield Home for Aged Women one thousand dollars as a memorial of my deceased sister, Eliza Lombard, to be paid to said corporation within one year after my decease.

(13) I give to the Springfield Hospital, in said Springfield certificate of stock of Connecticut and Passumpsic River Railroad, No. 58, dated May 13, 1887, for twenty shares, and also enough more from such other part of my estate, not otherwise specifically devised and bequeathed, as my executors shall think best to take it from, to make up the sum of ten thousand dollars, to be known as ‘The Lombard Fund,’ to endow a bed, to be called and known as “The Lombard bed,” in the use and occupancy of which my relatives are to be preferred.

(14) The use of my share of the homestead and furniture, and of all my property, — save small legacies, — left as a residue and remainder, for one year after my decease, and as much longer as she shall choose to stay and use the same, I give to Helen B. Angell, she paying the taxes and necessary repairs; and after the settlement of my estate, I give to her, during her life, the use of three-fifths, and to her brother, John L. Bardwell, the use, during his life, of two-fifths, of the rest, residue, and remainder of my estate. In case of the death of Helen B. Angell during said John L.

Bardwell's lifetime, then I give him the use of the whole during his lifetime, and in case of his death during her lifetime, then I give her the use of the whole of said residue and remainder during her lifetime; but his use of more than two-fifths is conditioned upon his residence in said Springfield.

After the death of both said Helen B. Angell and John L. Bardwell, I give, devise, and bequeath all the residue and remainder, in equal shares, to the Springfield Hospital, and to the Springfield Home for Aged Women, to be added to and to become a part of the Lombard fund, hereinbefore given to said corporations, and to be a permanent fund, the income only to be used, and upon the terms and conditions before stated. The share of the residue and remainder, devoted to the use of John L. Bardwell, shall be held in trust for him, and I designate my executrices, hereinafter named, as the trustees, without bonds.

Whatever household furniture there may be over and above the wants of Helen B. Angell, I wish her to distribute among family relatives, according to her best judgment."

The only remaining clause contains the appointment of executrices. The will was made on April 22, 1890.

The testatrix had in her own name twenty shares of stock of the First National Bank, of the market value of \$2,800, five shares of the Second National Bank, of the market value of \$750; twelve of the John Hancock National Bank, of the market value of \$1,500; and nineteen of the Chapin National Bank, of the market value of \$2,755; the aggregate market value of these shares being \$7,805. In addition to these shares, there were sixteen other shares, of the stock of the Chapin National Bank, of the market value of \$2,320; making with the bank stocks standing in her own name, an aggregate market value of \$10,125, in which sixteen shares the testatrix was thus interested.

The certificates for these shares stood in the name of one Frances Lombard, her sister, who died in 1885, and who owned them until her death, and who, by her will proved

and allowed on October 7, 1885, gave the rest and residue of her estate to this sister, Margaret H. Lombard, and to her brother, Justin Lombard, "to have and to hold the same to them and the survivor of them, and to the heirs of such survivor, forever." Margaret and Justin Lombard received letters testamentary, with this will of Frances Lombard annexed, on October 7, 1885, and took possession of all her estate, including these sixteen shares; but they did not change the certificate. Justin died on January 30, 1890, and up to that time the dividends on the sixteen shares were drawn, sometimes by him and sometimes by Margaret. Margaret was appointed administratrix of the estate of Justin on May 7, 1890, but never qualified. After the death of Margaret, one Lee was appointed administrator of the estate of Justin, and as such administrator makes no claim to the sixteen shares. Lee was also appointed, on November 4, 1890, administrator *de bonis non* with the will annexed of the estate of Frances Lombard, and as such filed an inventory including the sixteen shares. Afterwards on October 7, 1891, upon his petition, which recited that all claims against the estate had expired, and that it had been fully administered except as to the rest and residue thereof, and that he had in his hands a large amount of personal property, and asking instructions as to whom he should pay it over, the Probate Court decreed that immediately upon the death of Justin Lombard, the property vested absolutely in Margaret Lombard, with full power of disposal by will or otherwise, and ordered Lee to pay the same to the executrices of her estate. We regard this petition of Lee, and the decree of the Probate Court thereon, merely as showing that the shares are now in the control of the petitioners in the present case, and so subject to be disposed of in accordance with our decree, if we find that Margaret Lombard intended such a disposition of them.

It therefore appears that, while Margaret Lombard never held in her own name certificates for these sixteen shares, she had held in possession jointly with her brother the certificate, which was in the name of her deceased sister, for

more than four years before the making of her own will ; while she was at the same time jointly interested in the shares with her brother, with a right of survivorship ; and that, for some months, before she executed her own will, she held, by survivorship, the sole beneficial interest in the shares, the certificate of which had during the same time remained in her own sole possession. These shares were moreover but a part of what it seems was a large property, not needed for any debts or charges of the estate of her deceased sister, and the beneficial interest in which she must have long considered to be jointly in herself and her brother Justin and which she must have considered to be in herself alone by survivorship after his death in January, 1890. Under these circumstances, it is impossible to escape the conclusion that when she came to execute her own will in the April following her brother Justin's death, she considered the sixteen shares as her own, and intended to dispose of them by her will.

Coming to the construction of the twelfth clause, and placing ourselves as nearly as possible in her situation, we find no difficulty in ascertaining its meaning. With the sixteen shares of Chapin National Bank stock to which she was entitled as part of the residuary estate of her deceased sister, she was the owner of shares in banks, named in this clause, of the aggregate market value of \$10,125. It is very plain that she intended by that clause to give to the Springfield Home for Aged Women those shares, up to the amount of \$10,000 in market value, directing that the legacy be kept as a permanent fund, to be known as the "Lombard Fund," and its income only to be expended by the legatee, and with the further direction that the legatees should not sell the shares unless it should become necessary. The gift of the dividends and income of the shares to that amount was clearly intended as an absolute gift of the shares, *Chase v. Chase*, (132 Mass. 473), and cases cited, and not as a gift of the income and dividends merely, to be accumulated until they should amount to the sum mentioned. If, as contended by the other parties, the

testatrix had designed to give only the income of the shares and to have that income accumulated until it amounted to the sum of \$10,000, she would, no doubt, have expressed in plain terms an intention so complicated and unusual; and she could not in that case have used the language which she did employ, especially the direction that "it," referring to the \$10,000 worth of enumerated shares, "be kept as a permanent fund," and that "the said shares of bank stock shall not be sold unless it becomes absolutely necessary." The latter direction is not limited in point of time; yet, upon the theory that the clause does not dispose of the stock itself, the will makes no further specific gift of them, and there could be no object in directing that, after the income had been accumulated, the shares themselves should not be sold. The thirteenth clause, the construction of which has not been questioned, and the final residuary provision in the fourteenth clause, both support the conclusion to which we have arrived. The thirteenth clause gives to another local charity, the Springfield Hospital, a like sum of \$10,000, to be also known as a "Lombard Fund," to be constituted in part of certain specified shares of stock, the balance of the sum to be made up from other property not specially devised, and this is a legacy to take effect immediately; while the fourteenth clause divides the final residue equally between these two charities, thus showing an intention to treat these two legatees substantially alike. We are therefore of opinion that by the twelfth clause of her will the testatrix intended to give to the Springfield Home for Aged Women the shares of the banks therein named, either standing in her own name or in which she had the beneficial interest under the will of Frances, to the amount of \$10,000 in market value, and that it is the duty of her executrices to procure the transfer of those shares to that amount to the legatee; and that, as the bequest is in effect a specific legacy, it carries the dividends paid upon shares since the death of the testatrix.

2. The question of present importance as to the construction of the fourteenth clause is as to what portion of

the estate Helen B. Angell was entitled to the sole use, and for what period of time. The first portion of this clause is somewhat blindly expressed, but we are of opinion that the testatrix meant to give to Helen B. Angell the use of the testatrix's share of the Lombard homestead and furniture, so long as she should choose to stay at the homestead, charging her to distribute among the family relatives any furniture which she might not herself want; that, in the contemplation of the testatrix, the "rest, residue, and remainder" of her estate, in the use of which after the settlement Helen B. Angell and John B. Bardwell are to share during their lives, included all her property (except the share in the homestead and furniture) not needed to satisfy the legacies given in the first thirteen clauses of the will. Of this residuary property Helen B. Angell is to have the use during the time reasonably consumed in the payment of debts and of the legacies contained in the first thirteen clauses, and such other operations as may arise in the settlement of the estate. Such is the property "left as a residue and remainder" that is not otherwise previously disposed of. Just what was intended by the words "save small legacies" we can not determine; but we do not understand any claim to be made that Helen B. Angell was intended by this clause to take for one year after the death of the testatrix the income of all of the estate not given in small legacies, while the words, "and as much longer as she shall choose to stay and use the same," clearly refer to the homestead and furniture. It is now more than two years since the death of the testatrix, and the case discloses nothing remaining to be done in the settlement of the estate which ought not to be concluded upon ascertaining the decision in the case at bar. The bequest of John L. Bardwell is to take effect after the settlement of the estate, and the share given him is only for life, and is to be held in trust by the petitioners. It is therefore their duty, as soon as possible, to ascertain and set apart his two-fifths of the residue, in accordance with the construction arrived at in this decision, and to hold it for his benefit during his life.

It is unnecessary now to determine any questions which may arise if he shall survive Helen B. Angell, and shall cease to reside in Springfield, or what would become of the testatrix's share of the homestead in contingencies which may not occur.

At the death of both Helen B. Angell and John L. Bardwell, it is clear that all that then remains of the estate of the testatrix is to be equally divided between the Springfield Home for Aged Women and the Springfield Hospital.

Decree to be framed accordingly.

A gift of the income arising from land is a gift of a corresponding estate in the land. *Andrews v. Boyd*, 5 Md. 199; *Butterfield v. Haskins*, 33 Me. 392; *Sampson v. Randall*, 72 Me. 109; 2 Am. Prob. Rep. 1; *Monarque v. Monarque*, 80 N. Y. 320; 1 Am. Prob. Rep. 494; *Frances' Estate*, 25 Smith (Pa.) 220; *Cooper v. Pogue*, 92 Pa. St. 254, 2 Am. Prob. Rep. 196. A bequest of the income arising from land is equivalent to a devise of a corresponding estate in the land. *Andrews v. Boyd*, 5 Me. 199; *Butterfield v. Haskins*, 33 Me. 392; *Earl v. Rowe*, 35 Me. 414; *Sampson v. Randall*, 72 Me. 109; 2 Am. Prob. Rep. 1; *Monarque v. Monarque*, 80 N. Y. 320; 1 Am. Prob. Rep. 494. So is the gift of the "issues and profits." *Parker v. Plummer*, Cro. Eliz. 190. Or the "rents." *Kerry v. Derrick*, Cro. Jac. 104, 8 Co. 95 b.; *Jennings v. Conboy*, 73 N. Y. 230. "Rents and profits." *Haverstick v. Duffenberg*, 2 Edm. S. C. (N. Y.) 463. "Rents, issues and profits." *Stewart v. Garnett*, 3 Sim. 898. "Produce." *Newland v. Sheppard*, 2 P. Williams, 194. "Net profits." *Earl v. Rowe*, 35 Me. 414.

A bequest of the income arising from an estate to four daughters "to be divided between them share and share alike, during their and each of their respective natural lives, the remainder to their respective children and their respective heirs and assigns forever," is equivalent to a devise to the daughters in severalty of a life estate in one-fourth of the property with remainder to their children. *Monarque v. Monarque*, 80 N. Y. 320; 1 Am. Prob. Rep. 494. A gift of the issues and profits for life was held to pass a life estate in the land. *Parker v. Plummer*, Cro. Eliz. 190. So was a bequest of the rents for life. *Kerry v. Derrick*, Cro. Jac. 104, 8 Co. 95 b. A devise of the income to the use of the devisee during his life. *Butterfield v. Haskins*, 33 Me. 392. A clause giving full power and authority and control to sell certain property and receive the rent of it to a person not appointed executrix or trustee under the will, conveys the fee, which is not cut down, or affected by the power of sale. *Jennings v. Conboy*, 73 N. Y. 230. Under a devise of rents and profits for life devisee takes the land for life; if it is a devise of rents and profits in perpetuity, devisee takes a fee. *Haverstick v. Duffenberg*, 2 Edm. S. C. 463. A

devise of a moiety of the rents, issues and profits, is a devise of a moiety of the estate in fee. *Stewart v. Garnett*, 3 Sim. 398.

After the devise of several parts of the real and personal estates to several persons, a devise of the interest and produce of the surplus of his real and personal estate to the grandchildren until their age of twenty-one, will pass the absolute right and property of the real and personal estate to the grandchildren after that age. *Newland v. Sheppard*, 2 P. Wins. 194. Under bequest of all moneys upon mortgages and on notes out of interest, legatee takes title to the mortgage. *Doe Dem. Guest v. Bennett*, 5 Eng. L. & Eq. 536. A gift of the interest or income of a fund or other personal property is a gift of the fund. *Stone v. North*, 41 Me. 265; *Sampson v. Randall*, 73 Me. 109; 2 Am. Prob. Rep. 1; *Manning v. Craig*, 3 Green. Ch. 436; *Craft v. Snook*, 13 N. J. Eq. 121; *Guilick v. Guilick*, 25 N. J. Eq. 325; S. C., 27 N. J. Eq. 498; *Huston v. Read*, 32 N. J. Eq. 591; 1 Am. Prob. Rep. 501; *Bishop v. McClelland's Exec'r*, 44 N. J. Eq. 450; *Earl v. Grim*, 1 Johns. Ch. 494.

A direction that the real estate be sold by the executors and the proceeds be put out at interest, on good security, and the *interest* be annually paid, in equal proportion, to certain persons and the survivors of them, without any limitation of time, the will being silent as to any further disposition as to the principal or residuum of the real estate, was held to be a bequest of the *principal* as well as the interest; it being apparent, from the introductory, and other clauses in the will, that the testator did not intend to die intestate, in that respect. *Earl v. Grim*, 1 Johns. Ch. 494. Under a direction that trustees pay the dividends and interest of certain stocks and funds to the legatees share and share alike, and the survivor of them as they attained the age of twenty-one the principal passed. *Phillips v. Chamberlaine*, 4 Ves. 51.

C. C. MARTIN AND OTHERS *vs.* A. G. B. MARTIN, EXECUTOR,
AND OTHERS.

[69 Mississippi, 315.]

LIFE ESTATE IN PERSONALTY—POSSESSION BY LIFE TENANT—
BOND.

Under a bequest of certain personal property and \$5,000 in money to be paid by the executors within sixty days after testator's death, to his wife for her use and benefit during life or widowhood, she is entitled to the possession of the property without giving security for the protection of the remainder-men; though it be shown that she is insolvent and that her

habits are such that the fund will be squandered; the testator having been a wealthy man and the money bequeathed being the principal provision made for her by the will.

APPEAL from Chancery Court, Copiah county.

Bill in equity by C. C. Martin and others against A. G. B. Martin and R. N. A. Martin, executors under the last will and testament of B. F. Martin, deceased, and Eleanor J. Martin, to compel the executors before paying over to said Eleanor J. Martin the money bequeathed to her by said will, to require her to give security for the forthcoming of the fund on her death or marriage. That portion of the will containing the bequest in question is as follows :

"I give, devise, and bequeath to my beloved wife, Eleanor Jane Martin, all my stock cattle (not including oxen), cows, calves, etc.; all my stock hogs; my dark iron gray mule, named Jane; a good horse and buggy, to be provided for her by my executors hereinafter named; and also \$5,000 in money, to be paid to her by my executors hereinafter named, within sixty days after my decease; to have and to hold the same to her for life, provided she shall not marry any one else. In case the said Eleanor Jane shall marry any one, then all the property hereby devised to her shall revert to my sons and daughters. Should she remain unmarried, she shall retain the said property to her sole use and benefit during her life, and at her death the same shall revert to my children."

J. S. Sexton and Willing & Ramsey, for appellants.

R. N. Miller, for appellees.

WOODS, J.—There is no dispute between counsel for the respective parties as to the law governing gifts or bequests of personal property or money with remainder over. It is agreed perfectly that a bequest of money for life to one, with remainder over to another, is a bequest of the interest derivable from the money, and that the legatee for life, upon proper showing made that the bequest will be wasted and lost, may be required to give security for the protection

of the remainder-man's interest. But it is further asserted by counsel for appellees that any intention of the testator to pass the bequest itself to the legatee for life, and to require no security from such legatee for the protection of the remainder-man's interest, will make such bequest exceptional, and relieve it from the operation of the general rule agreed upon by counsel, as above stated; and this assertion of the limitation on or modification of the general doctrine is altogether correct. We have, then, a pure question of testamentary construction, stripped of entangling legal controversy. Does the bequest to the testator's wife fall within the exceptional class of cases? Was it the intention of the testator to have the \$5,000 paid over in specie to the widow? Was it his design to permit her to use this bequest without giving security for its absolute preservation? We have no hesitation in answering all these questions affirmatively.

First. The executors are directed to pay \$5,000 in money to the widow within sixty days after the death of the testator.

Second. The will declares that the widow shall retain the property devised to her, to her sole use and benefit during her life, if she shall remain unmarried.

Third. The bequest of \$5,000 in money is the principal provision made for the support and maintenance of the widow by the will of her husband—a man of fortune—as plainly appears from the will itself. We are clearly of opinion that the bequest of \$5,000 in money is to be paid to the widow without security from her. This view of the case conclusively determines the pending controversy, and we are not required to go further. We are not to be understood as making any intimation of opinion touching any supposed superior estate in the personal property and money bequeathed to the widow. In any aspect, she must receive the \$5,000 without security, and this is the extent of the present determination. The decree of the Chancery Court is in accordance with these views, and it is therefore affirmed.

PEIRCE *et al.*, Trustees, Appellants, *vs.* HUBBARD.

[152 Pennsylvania State, 18.]

ISSUE AS WORD OF PURCHASE — CONTINGENT REMAINDER.

Under a will directing that a fund be invested for testator's daughter and the interest paid to her, and in case of her death without issue, or issues of her children, then reversable to his right consanguinary heirs, the daughter takes a life estate only; the word "issue" being used in the sense of children and as a word of purchase.

The daughter takes no interest under the devise over, which is a contingent remainder vesting only on her death without lineal descendants and in favor of those who at that time should be the heirs of testator.

APPEAL from Court of Common Pleas, Philadelphia county.

Ejectment by George Peirce and Elijah Dallett, trustees under the will of Caroline McKee, deceased, against George K. Hubbard and J. Quincy Adams, trading as George K. Hubbard & Co. Judgment for defendants. Plaintiffs appeal.

Henry Budd, for appellants.

Nathan H. Sharpless, for appellees.

MCCOLLUM, J.—Refraining from any expression of opinion in harmony with or adverse to the views of the learned judge of the court below respecting the rule in Shelley's Case, and the alleged perversions of it, we concur in his conclusion that the appellants have no title to the land in dispute. Their claim to it rests on a construction of the will of Joseph Martin du Columbier, which is not demanded by that rule, or by any expressed or implied intention of the testator. Indeed, their contention, if successful, will defeat his manifest purpose in the disposition of that portion of his estate which is the subject of this controversy. It is our duty, in the interpretation of his will, to avoid such a result, unless it is compelled by some inexorable rule of construction. The testator, having provided that his

debt to the bank and the annuity to his widow should be paid from the rents of his store on Market street, directed that one-third of the surplus of such rents should be paid to his daughter, Caroline McKee, and that on the sale of said store after the expiration of the lease to "Tingley Burton & Co.," one-third of the amount of the sale should be invested on mortgages, etc., the interest to be regularly paid to her, "free from control, liabilities, and debts of her husband; and, in case of her death without issue, or issues of her children, then reversable to my [his] right consanguinary heirs." It is claimed by the appellants that, under the provisions of the will we have summarized, Mrs. McKee became possessed of an estate in fee simple in one-third of the Market street property, and by the appellees that she took but a life-estate therein, and at her death without children or their issue surviving her the remainder vested in the persons who were then the right heirs of the testator.

It is apparent on the face of the will that the claim of the appellees is in accord with the intentions of the testator respecting the property in question. It must be conceded, however, that the word "issue" in a will *prima facie* means "heirs of the body," and that the expression "in case of her death without issue," standing alone, imparts a general indefinite failure of issue, and not a failure at the death of the first taker. But, in either case, the *prima facie* and technical meaning of these words must yield to a manifestly contrary intent gathered from the whole will. If it appears that the testator used the word "issue" in the sense of "children," it will be construed as a word of purchase in order to give effect to his intention. In the present case we think the word "issue" was so used. The language of the testator is: "And, in case of her death without issue, or issues of her children," then over, etc. The obvious meaning of the paragraph in question is that if his daughter, Caroline, died without children or their issue living at her death, the remainder should vest in the persons who at that time answered the description of his "right consanguinary heirs." In the devise over, Mrs. McKee took no

interest. It was contingent. It could not be known until her death that anything would pass by it, and, on the happening of the contingency of her death without children or their issue surviving her, the persons entitled to take under it were those who were then the right heirs of the testator. It is suggested that the appellants' contention is sustained by *McKee v. McKinley* (33 Pa. St. 92). That case involved the construction of another clause of the will under consideration, and, it must be admitted, is apparently in conflict with our conclusion; but to the extent that it is applicable to this case it was substantially overruled in *Guthrie's Appeal* (37 Pa. St. 9), and has not since been recognized as authority. The specification of error is overruled. Judgment affirmed.

THOMAS, APPELLANT *vs.* BLACK *et al.*

[118 Missouri, 66.]

CHILDREN OMITTED FROM WILL — PRESUMPTION — RIGHTS—
LIMITATIONS OF ACTIONS.

By devising his property to his second wife for life with remainder to her children, and making no mention of the children by his first wife, testator dies intestate as to them, under Revised Statute, State of Missouri, 1880, section 8877, providing that children omitted from the will shall be entitled to the same share of the parent's estate as though he had died intestate.

The presumption that the omission was unintentional can be overcome only by what appears from the will itself and not by extrinsic evidence.

The children so omitted from the will are entitled to come in as defendants and set up their claims in an action of partition among the devisees of the will.

The statute of limitations does not run against them during the lifetime of the widow, her possession, whether she be regarded as tenant of the homestead or in possession under her right of quarantine or under the will, not being adverse to the heirs.

APPEAL from Circuit Court, Buchanan county, O. M.
SPENCER, Judge.

Partition by Joseph C. Thomas against Anna Black, Julia M. Burchell, and Mattie Thomas, children of the second wife of William C. Thomas, deceased. By order of court, Miley H. Chapman was also made a defendant, and claimed an interest in decedent's lands as vendee of decedent's five children by his first wife. From a judgment allowing Chapman five-ninths, and the other defendants and plaintiff each one-ninth, of the real estate, all the children of decedent's second wife appeal.

Porter & Woodson for plaintiff, appellant.

B. R. Vineyard, for defendants, appellants.

J. W. Boyd, for respondent, Chapman.

THOMAS, J.—This was a proceeding for the partition of a farm, lying in Buchanan county, containing 144.65 acres, and the record before us shows that William C. Thomas, the owner of this farm, had been twice married, and had children by two wives. On the 23d day of January, 1864, he executed a will, by which he devised the farm in controversy, on which he then lived, to his wife, Mary C. Thomas, during her life, with remainder to her children begotten by him; there being in the will no other reference to, or mention of, his children by name or otherwise. On the 18th day of February, 1864, the testator having died, this will was duly probated, and Mary C. Thomas, the widow, occupied the farm, claiming it under the will, till her death, in 1888. The trial court held that William C. Thomas died intestate as to the children of his first wife, and the descendants of those who had died; and this, in connection with the statute of limitations, and the nature of the title of a pretermitted heir, presents the only question for decision.

1. Section 10 of the Statute of Wills of 1855, in force in 1864, which is the same as section 8877, Revised Statute, 1889, provides that every testator shall be deemed to die intestate as to "a child or children, or descendants of such

child or children (in case of their death), not named or provided in such will;" and such child or children, or their descendants, shall be entitled to such portion of the estate as if he had died intestate; and "all the other heirs, devisees, and legatees shall refund their proportional part."

The children of the testator by his wife, Mary C., though not expressly mentioned, were named and provided for, within the meaning of this section, for the naming of children as a class, without further description, includes all who answer that description at the time the will took effect. (*Allen v. Claybrook*, 58 Mo. 124.)

But it is equally clear that his children by the first wife were not named or provided for in this will, within the meaning of the section cited. Where children are not named, the presumption is that they were unintentionally omitted; and while this presumption may be rebutted, when the tenor of the will, or any part of it, indicates that they were not forgotten, yet it cannot be made to appear by parol evidence, but it must appear on the face of the will, that the testator remembered them; and where they are neither expressly named, nor alluded to as to show affirmatively that they were in the testator's mind, such presumption becomes conclusive. (*Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; *Wetherall v. Harris*, 51 Mo. 65.)

The children of the first wife are not expressly named or referred to as a class; nor does it affirmatively appear, on the face of the will, that they were remembered by the testator at the time he executed it; and there was therefore, as to them, an intestacy, and the ruling of the trial court on that proposition was correct.

2. The possession of this land by the widow for a period of more than ten years does not bar the right of the heirs by the first wife to demand and obtain their interests therein. Her interest in the premises was for life only, whether she be regarded as a tenant of the homestead under the Act of 1863 (Sess. Acts 1863, pp. 22, 23), or by her right of quarantine, till the assignment of dower therein, or under the will; and therefore her possession is not ad-

verse to the heirs, and the statute of limitations will not begin to run, as to them, prior to her death. (*Sutton v. Casseleggi*, 77 Mo. 397; *Jones v. Manly*, 58 Mo. 559; *Brown v. Moore*, 74 Mo. 633; *State v. Moore*, 61 Mo. 280.)

3. The ancestor of the children by the first wife having died intestate as to them, they had the right to set up their interests, which were legal interests, in the land by inheritance from him in an action of partition, such as this is. (*McCracken v. McCracken*, 67 Mo. 590.) The judgment will be affirmed.

All concur.

Children omitted from will.—It is provided by statute that a child or issue of a deceased child, not mentioned or provided for in the will of the parent, shall receive the same share of the estate as though the parent had died intestate in *Arkansas*: *Branton v. Branton*, 23 Ark. 569. *Missouri*: *Block v. Block*, 8 Mo. 594; *Guitar v. Gorden*, 17 Mo. 408, 411; *Bradley v. Bradley*, 24 Mo. 311, 317; *Beck v. Metz*, 25 Mo. 70, 72; *Hockersmith v. Slusher*, 26 Mo. 287; *Hargadine v. Pulte*, 27 Mo. 423; *Hill v. Martin*, 28 Mo. 78, 80; *Pounds v. Dale*, 48 Mo. 270; *Whetherall v. Harris*, 51 Mo. 65; *Schneider v. Koester*, 54 Mo. 500. *New Hampshire*: *Gage v. Gage*, 29 N. H. 533. *Oregon*: *Gerrish v. Gerrish*, 8 Or. 351; 1 Am. Prob. Rep. 59; *Northrop v. Marquam*, 16 Or. 173, 186; 18 Pac. Rep. 449; *Worley v. Taylor*, *ante*, p. 147; 23 Pac. Rep. 903. *Washington*: *Boman v. Boman*, 47 Fed. Rep. 849; s. c. 497; Fed. Rep. 829; *Bower v. Bower*, 5 Wash. 225; 31 Pac. Rep. 598; *Barker's Estate*, 5 Wash. 390; 31 Pac. Rep. 976; *Hill v. Hill*, 7 Wash. 409; 35 Pac. Rep. 360. If it shall appear that such omission was not intentional, but the result of accident or mistake in *Michigan*: *Estate of Stebbens*, 94 Mich. 304; 54 N. W. Rep. 159. *Minnesota*: *Young v. Case*, 3 Minn. 209. *Wisconsin*: *Moon v. Evan's Estate*, 69 Wis. 667. Unless it appears that the omission was intentional in *California*: *Payne v. Payne*, 18 Cal. 291, 302; *Estate of Garrand*, 35 Cal. 336, 338; *Estate of Utz*, 43 Cal. 200; *Pearson v. Pearson*, 46 Cal. 609, 625; *Estate of Wardell*, 57 Cal. 484, 488; *In re Grider*, 81 Cal. 571, 575; 22 Pac. Rep. 908; *Estate of Stevens*, 83 Cal. 322; 23 Pac. Rep. 379; *Estate of Barter*, 86 Cal. 441, 443; 25 Pac. Rep. 15; *Smith v. Olmstead*, 88 Cal. 581, 595; 26 Pac. Rep. 54; *Rhoton v. Blevin*, 99 Cal. 645; 34 Pac. Rep. 513; *Salmon's Estate*, 40 Pac. Rep. 1030. *Utah*: *Coulam v. Doull*, 4 Utah, 267; 9 Pac. Rep. 568; s. c. 133 U. S. 216; 10 Sup. Ct. 253. Unless it appears that the omission was intentional and not the result of accident or oversight in *Iowa*: *Lorieux v. Keller*, 5 Iowa, 196, 200; (repealed.) *Maine*: *Smalley v. Smalley*, 70 Me. 545, 550; *Whittmore v. Russell*, 80 Me. 297; 14 Atl. Rep. 197; *Morrill v. Hayden*, 86 Me. 133; 29 Atl. Rep. 949. *Massachusetts*: *Lorings v. Marsh*, 6 Wall (U. S.) 337, 350; *Tucker v. City of Boston*, 35 Mass. (18 Pick.) 162, 166; *Wilson v. Fosket*, 47 Mass. (6 Met.) 400; *Bancroft v. Ives*, 69 Mass. (3 Gray) 367; *Converse v. Wales*, 86 Mass. (4 All.)

512; *Prentiss v. Prentiss*, 93 Mass. (11 Gray) 47; *Wilder v. Thayer*, 97 Mass. 439; *Ramsdill v. Wentworth*, 101 Mass. 124; 106 Mass. 320; *Peters v. Siders*, 126 Mass. 135, 137; *Hurley v. O'Sullivan*, 137 Mass. 86; 4 Am. Prob. Rep. 31.

After-born children are included among those to whom the provisions for omitted children apply, though not specially mentioned. *Pearson v. Pearson*, 46 Cal. 609. Though there is a special statute in favor of posthumous children. *Bancroft v. Ives*, 69 Mass. (3 Gray) 367; *Prentiss v. Prentiss*, 93 Mass. (11 Gray) 47; *Petition of Minot*, (Mass.) 40 N. E. Rep. 78. The subsequent birth of a child operates as a revocation of the will in *Georgia*: *Hollman v. Copeland*, 10 Ga. 79; *Hart v. Hart*, 70 Ga. 764. *Iowa*: *McCullom v. McKensie*, 26 Iowa, 510; *Carey v. Baughn*, 36 Iowa, 540; *Negus v. Negus*, 46 Iowa, 487; *Fallon v. Chidester*, id. 588; *Milburn v. Milburn*, 60 Iowa, 411; *Alden v. Johnson*, 63 Iowa, 125; 18 N. W. Rep. 696. Even though such a child be an illegitimate child but recognized by the father. *Milburn v. Milburn*, *supra*. Unless the contrary intent appears in *Indiana*: *Hughes v. Hughes*, 37 Ind. 183; *Morse v. Morse*, 42 Ind. 865. If at the time of the execution of the will testator had no child. *Evans v. Anderson*, 15 Ohio St. 324. And a child *en ventre sa mere* is not a child *in esse*. *Id.* Such post testamentary child is given its proportionate share of the estate unless the contrary intent appears in *Illinois*: *Osborn v. Jefferson Nat. Bk.* 116 Ill. 130; 4 N. E. Rep. 791; *Ward v. Ward*, 120 Ill. 111; 11 N. E. Rep. 326. *Maine*: *Waterman v. Hawkins*, 63 Me. 156, 160. *Minnesota*: *Prentiss v. Prentiss*, 14 Mo. 18, 20. *Nebraska*: *Chicago B. & R. Co. v. Wasserman*, 22 Fed. Rep. 872. *New York*: *Williams v. Freeman*, 83 N. Y. 561, 568; *Smith v. Robertson*, 89 N. Y. 555, 558; *Matter of Murphy*, 144 N. Y. 557; 39 N. E. Rep. 691; *Luce v. Burchard*, 78 Hun, 537, 539; 29 N. Y. Supp. 215; *Re Witter's Estate*, 2 Con. 530; 15 N. Y. Supp. 133; *Matter of Gall*, 5 Dem. 374; *Matter of Bunce*, 6 Dem. 278; *Matter of Huiell*, id. 352; *Bunce v. Bunce*, 14 N. Y. Supp. 659, 660; *Mitchell v. Blain*, 5 Paige, 588. *Pennsylvania*: *Walker v. Hall*, 34 Pa. St. 433; *Edward's Appeal*, 47 Pa. St. 144; *Hollingsworth's Appeal*, 51 Pa. St. 519; *Willard's Estate*, 68 Pa. St. 327; *Robens v. Marlatt*, 136 Pa. St. 35, 41; 20 Atl. Rep. 172. *Rhode Island*: *Chase v. Chase*, 6 R. I. 407, 411; *Potter v. Brown*, 11 R. I. 232; *Re Witter's Estate*, *supra*. *Tennessee*: *Burns v. Allen*, 937 Tenn. 149; 23 S. W. Rep. 111. *Wisconsin*: *Breese v. Stiles*, 22 Wis. 120. Unless expressly excluded by the will in *Kentucky*: *Sneed v. Ewing*, 5 J. J. M. 460; *Haskins v. Spiller*, 1 Dana, 170; *Woodward v. Spiller*, id. 179, 181; *Shelby's Exr. v. Shelby*, 6 Dana, 60; 1 B. Monr. (Ky.) 266; *Leonard v. Enochs*, 92 Ky. 186; 27 S. W. Rep. 437. Special statutes in favor of posthumous children are found. In *Iowa*: *McCullom v. McKensie*, 26 Iowa, 510, *Massachusetts*: *Bancroft v. Ives*, 93 Mass. (11 Gray) 397; *Bowen v. Hoxie*, 137 Mass. 527; *Petition of Minot*, 40 N. E. Rep. 63. *South Carolina*: *Talbird v. Verdun*, 1 Des. 592. *Utah*: *Conlan v. Doull*, 133 U. S. 216; 10 Sup. Ct. Rep. 253.

The tendency of the courts is to permit the greatest liberty of testamentary disposition consistent with the express provisions of the respective statutes, and almost anything that will show that the child was not forgotten by the testator is held to take the will out of the operation of the statute. *Terry v. Foster*, 1 Mass. 146. Thus it is said that the statute does not require that an actual pro-

vision shall be made for the children, nor that the children shall be designated by name, that its object is not to compel parents to make testamentary provision but to prevent the consequence of forgetfulness or oversight. *Gerrish v. Gerrish*, 8 Or. 351; 1 Am. Prob. Rep. 59, 62. Its object is to produce an intestacy only when the child or descendants of such child are forgotten or unknown and thus unintentionally omitted, and the presumption that the omission is intentional may be rebutted when the tenor of the will or any part of it indicates that the child or grandchild was not forgotten. *Hockersmith v. Slusher*, 26 Mo. 237.

Under the statutes of the class first mentioned, the question of the intent of the testator is said to be immaterial and extrinsic evidence to explain the omission cannot be received except to show advancements to the child in those states in which such advancements take the case out of the operation of the statute. *Boman v. Boman*, 49 Fed. Rep. 329, 332; *Branton v. Branton*, 23 Ark. 569; *Trotter v. Trotter*, 31 Ark. 145; *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270, 272; *Gerrish v. Gerrish*, 8 Or. 351; 1 Am. Prob. Rep. 59; *Chace v. Chace*, 6 R. I. 407; *Burns v. Allen*, 93 Tenn. 149; 23 S. W. Rep. 111; *Bower v. Bower*, 5 Wash. 225; 31 Pac. Rep. 598; *Hill v. Hill*, 7 Wash. 409; 35 Pac. Rep. 360.

Under those statutes requiring the intent to appear from the will extrinsic evidence is, of course, inadmissible. *Chicago B. & R. R. Co. v. Wasserman*, 22 Fed. Rep. 872; *Breese v. Stales*, 22 Wis. 120.

As it cannot appear from the will itself that the omission was not the result of accident or mistake, extrinsic evidence is clearly admissible under those statutes containing that clause. *Loring v. Marsh*, 6 Wall. 337; *Lorrieux v. Keller*, 5 Iowa, 196; *Wittmore v. Russel*, 80 Me. 297; 14 Atl. Rep. 197; *Hayden v. Merrill*, 80 Me. 133; 29 Atl. Rep. 149; *Wilson v. Fosket*, 47 Mass. (6 Met.) 400; *Converse v. Wales*, 86 Mass. (4 All.) 512; *Ramsdill v. Wentworth*, 101 Mass. 124; *Buckley v. Gerard*, 123 Mass. 8; *Peters v. Siders*, 126 Mass. 137, 138; *Stebbens v. Stebbens*, 94 Mich. 304; 54 N. W. Rep. 159.

The California courts have uniformly held that the intention to omit or exclude must appear from the will itself and that extrinsic evidence is inadmissible, laying great stress on the words "not occasioned by accident or mistake" in some of the statutes as justifying the admission of extrinsic evidence in those cases. *Estate of Garraud*, 35 Cal. 336; *Estate of Stevens*, 83 Cal. 322; 23 Pac. Rep. 379; *Rhoton v. Blevin*, 99 Cal. 645, 647; 34 Pac. Rep. 513; *Estate of Salmon*, 40 Pac. Rep. 1080, by Chief Justice FULLER, says that the construction should be the same without these words and it was accordingly held that under the Utah statute extrinsic evidence was properly admitted. *Coulam v. Doull*, 133 U. S. 206, 232; 10 Sup. Ct. Rep. 253.

The presumption, however, is that a child not named is unintentionally omitted. *Coulam v. Doull*, 133 U. S. 216, 230; 10 Sup. Ct. Rep. 253; *Tucker v. City of Boston*, 35 Mass. (18 Pick.) 162, 167; *Pounds v. Dale*, 48 Mo. 270, 272; *Wetherall v. Harris*, 51 Mo. 65, 68; and the burden of proof is on those who claim the contrary. *Ramsdill v. Wentworth*, 106 Mass. 320; *Dove v. Tremont Nat. Bank*, 128 Mass. 349, 358; *Hurley v. O'Sullivan*, 137 Mass. 86; 4 Am. Prob. Rep. 31.

A mistake as to the legal effect of the provisions of the will is an accident or mistake within the meaning of the statutes. *Ramsdill v. Wentworth*, 101 Mass. 124. But not a mistake as to the legal effect of facts *dehors* the will. *Hurley v. O'Sullivan*, 137 Mass. 86; 4 Am. Prob. Rep. 31.

These statutes have been held to apply to illegitimate children omitted from the will of the mother. *Estate of Wardell*, 57 Cal. 484; *Bunce v. Bunce*, 14 N. Y. Supp. 659. But the contrary was held in *Sneed v. Ewing*, 5 J. J. M. (Ky.) 460, 474; *Kent v. Barker*, 68 Mass. (2 Gray) 585.

In the case of children living at the time of the execution of the will, merely nominal legacies or very slight circumstances are held to satisfy the requirements of the statute, as, a legacy of one dollar. *Boman v. Boman*, 47 Fed. Rep. 649, reversed on the ground that the legacies being to the heirs at-law, disclosed no intention of excluding the children. 49 Fed. Rep. 329. By the will adopting the provisions of another will in which the child or grandchild is named. *Gerrish v. Gerrish*, 8 Oreg. 351; 1 Am. Prob. Rep. 59. By mentioning the child in a codicil. *Payne v. Payne*, 18 Cal. 291, 302. By a clause in which the bequest of the estate to the wife to the exclusion of the children is explained. *Rhoton v. Blevin*, 99 Cal. 645; 34 Pac. Rep. 513. By legacies to the children of such child *eo nomine*. *Wild v. Brewer*, 2 Mass. 570; *Church v. Crocker*, 3 Mass. 17. By a legacy to the husband of the child, describing him as testator's son-in-law. *Wilder v. Goss*, 14 Mass. 357. And even where he was not so described, parol evidence of the relation being held admissible. *Hockersmith v. Slusher*, 26 Mo. 237. In the case of grandchildren by the mention of their deceased father and of two of his children. *Merrill v. Sanborn*, 2 N. H. 399. By a declaration that the child shall have no part of the estate. *Block v. Block*, 3 Mo. 594. A bequest to a grandchild not naming its parent has been held to be insufficient to exclude the parent. *Gage v. Gage*, 29 N. H. 533.

But a bequest to the wife "to the exclusion of all and every person or persons, be the same relatives or not," is insufficient to exclude the children. *Hargadine v. Polte*, 27 Mo. 423. And so is one to the husband "to the exclusion of everyone else who may be entitled to the same. *Barker's Estate*, 5 Wash. 390; 31 Pac. Rep. 976. A devise to a son of a deceased child, to show that the omission of the living children was intentional. *Bush v. Lindsay*, 44 Cal. 121. The mention of testator's "children," without even designating the number of them. *Arnold v. Arnold*, 62 Ga. 627. Nor does the fact that testator uses the expression "my child" in connection with the name and portion given to each of the living children, indicate that the omission of the children of a deceased daughter was intentional. *Estate of Utz*, 43 Cal. 200. Nor does a bequest to the widow of a son show any intention to omit her children. *Salmon's Estate* (Cal.), 40 Pac. Rep. 1030.

In the cases of after-born and posthumous children, however, the tendency is to require a more positive provision or explicit evidence of intention to exclude; thus the appointment of a wife or guardian of any child or children that testator might leave, and declaring that such guardianship was considered and intended as a proper and suitable provision for such child or children was held insufficient. *Hollingsworth's Appeal*, 51 Pa. St. 518. As was a devise in

trust, for wife during life, with remainder to surviving children. *Bowen v. Hoxie*, 137 Mass. 527. A bequest for life or widowhood with remainder to heirs. *Waterman v. Hawkins*, 68 Me. 156. And the fact that in certain contingencies property is given to testator's children. *Holloman v. Copeland*, 10 Ga. 79; *Potter v. Brown*, 11 R. I. 232. A clause showing confidence that should a child be born, the widow would do her utmost to properly rear it. *Walker v. Hall*, 84 Pa. St. 483. A direction to divide among the surviving children what may be left after the death of the widow, who is given power of disposition. *Alden v. Johnson*, 63 Iowa, 125; 18 N. W. Rep. 696. Any reversionary interest. *Willard's Estate*, 68 Pa. St. 329.

But a provision for children, if any, in the event of testatrix's husband dying before testatrix, was held sufficient. *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130, N. E. Rep. As is a provision contingent upon testatrix's leaving a child or children, he having none at the date of the will. *Freeman v. Layton*, 41 Ga. 58. So is an absolute devise to testator's children. *Haskins v. Spiller*, 1 Dana (Ky.) 170. But the contrary was held in *Armstead v. Dangerfield*, 3 Munf. (Ind.) 20. In the case of a child *en ventre sa mere* at the time of the execution of the will, a bequest in trust to pay the income to testator's wife during life and the reversion to those who would then be his heirs-at-law by blood. *Petition of Minot* (Mass.) 40 N. E. Rep. 63. A declaration in the will that the provisions made shall not be affected or changed by the birth of any child of testator. *Prentiss v. Prentiss*, 93 Mass. (11 Gray), 47; *Prentiss v. Prentiss*, 14 Minn. 18. A child in *en ventre sa mere* at the time the will was made, is held to be expressly excluded by a will giving the entire property to its mother, the testator having another child living at the time. *Leonard v. Enochs*, 92 Ky. 186, S. W. Rep. But not children born subsequently. *Negus v. Negus*, 46 Iowa, 487.

The children of a daughter in terms disinherited by the will cannot upon her subsequent death in the lifetime of testator claim as the children of a deceased child. *Estate of Barter*, 86 Cal. 441; 25 Pac. Rep. 15. Nor can the children of one who is given an annuity by the will. *Wilder v. Thayer*, 97 Mass. 439.

The omission of a child or children does not invalidate the will, it simply renders it inoperative as to such child or children. *Branton v. Branton*, 23 Ark. 569; *Trotter v. Trotter*, 31 Ark. 145; *Arnold v. Arnold*, 62 Ga. 627; *Lorieux v. Keller*, 5 Iowa, 196, 201; *Doane v. Lake*, 32 Me. 368; *Schneider v. Kocster*, 54 Mo. 500; *Smith v. Robertson*, 89 N. Y. 555, 558; *Matter of Murphy*, 144 N. Y. 557; 39 N. E. Rep. 691; *Luce v. Burchard*, 78 Hun, 537, 539; 29 N. Y. Supp. 215; *Matter of Gall*, 5 Dem. (N. Y.) 374; *Matter of Bunce*, 6 Dem. (N. Y.) 278; *Estate of Hueill*, 6 Dem. (N. Y.) 352; *Mitchell v. Blain*, 5 Paige (N. Y.) 588; *Northrop v. Marquam*, 16 Or. 173; 18 Pac. Rep. 449; *Hollingsworth's Appeal*, 51 Pa. St. 518, 520; *Chace v. Chace*, 6 R. I. 407, 412. But a will giving the entire estate to strangers, the heirs not being mentioned or provided for, is a nullity. *Burch v. Brown*, 46 Mo. 441.

FAHNESTOCK, APPELLANT, vs. FAHNESTOCK, *et al.*

[152 Pennsylvania State, 56.]

POWER OF SALE—DIRECTION—EQUITABLE CONVERSION—EXECUTION OF POWER.

The power of sale conferred on executors by a will, which gives an option to purchase at a valuation to the devisees to the extent of their respective shares, one-third of the estate being given to the widow for life, at her death to be disposed of in certain proportions, some of the shares to be invested and the income paid to legatees for life, as are also some of the shares in the residue, is not a naked power, but will be construed as a direction to sell, and, therefore, operate as an equitable conversion.

Such a power is not destroyed by the failure of the executors to exercise it within the time allowed by the will for the final settlement of the estate.

APPEAL from Court of Common Pleas, Allegheny county.

Bill by Benjamin S. Fahnestock against Vernon Fahnestock and others, for the partition of real estate of which Benjamin L. Fahnestock died seised. The will of Benjamin L. Fahnestock is as follows :

“First. I order and direct my executors to pay out of the assets of my estate all my debts of every description.

“Second. I hereby empower and authorize my executors to sell all my real estate and personal property at public or private sale, and to make and execute deeds in fee simple for my real estate ; but should any of my devisees hereinafter named, desire to purchase any part or parts of my real or personal property, not to exceed their proportionate share in my estate, they shall have the first choice, according to their respective ages (the eldest first), at a valuation to be fixed by my executors, hereinafter named; but, in case the valuation fixed by my executors is not satisfactory to any of them, then it shall be determined by three disinterested parties — one to be chosen by the party desiring to purchase, one by my executors, and the two thus chosen to choose the third. The decision of said referees shall be final and conclusive, and thereupon my executors shall make a deed in fee simple for such real estate, or make a proper

transfer of such personal property, upon such price and upon such terms as said referees may agree upon said award.

“Third. I give and bequeath unto my wife, Mary F. Fahnestock, all my household goods and furniture, also one-third of all my estate, to have and to hold the same during her natural life, and at her death the said one-third shall be divided and disposed of as follows, viz.: To my daughter Henrietta Fahnestock, one-sixth part; to the surviving children of my son Charles H. Fahnestock, their heirs and assigns, one-twelfth part, to be divided among them, share and share alike; to my son Benjamin S. Fahnestock, his heirs and assigns, one-sixth part; to my daughter Caroline Ringold Vandervoort, her heirs and assigns, one-sixth part; to my son Vernon Fahnestock, his heirs and assigns, one-sixth part; to Vernon Fahnestock, in trust for my son Levi Fahnestock, as hereinafter specified, one-sixth part; to my grandson William E. Fahnestock and granddaughter Ida May Fahnestock, children of my son Walter B. Fahnestock, deceased, one-twelfth part, to be divided between them, share and share alike; and I direct my executors to invest the said one-twelfth so bequeathed unto my said named grandchildren in good mortgages, real estate, or other safe securities, and to pay over to the said William E. Fahnestock and Ida May Fahnestock the interest or income thereof quarterly, share and share alike, during their natural lives; and at the death of either of them one-half of the principal shall be paid to his or her children, but in case of the death of either or both of my said grandchildren leaving no children to survive him, her, or them, his, her, or their share shall be divided among my surviving children, share and share alike, the children of any deceased child to take the same share his, her, or their parents would have taken if living.

“Fourth. All the rest and residue of my estate (real and personal) I give, devise, and bequeath as follows: One-sixth part thereof unto my daughter Henrietta Fahnestock, her heirs and assigns. One twenty-fourth part thereof unto my

son Charles H. Fahnestock, which shall be invested by my executors in mortgages or other safe securities, the interest of which shall be applied by them to his support, in case the United States government, in whose care he now is, shall cease to care for or support him ; but I further direct my executors shall send him, out of the interest of the foregoing bequest, clothing to an amount not exceeding \$100 per annum. At his death the foregoing bequest and accumulations accruing thereon shall be divided among his children, share and share alike. One twenty-fourth part to the children of my son Charles H. Fahnestock, their heirs and assigns, to be divided among them, share and share alike. One-sixth part thereof unto my son Benjamin S. Fahnestock, his heirs and assigns. One-sixth part thereof unto my daughter Caroline Ringold Vandevoort, her heirs and assigns. One-sixth part thereof unto my son Vernon Fahnestock, his heirs and assigns. One-sixth part thereof unto Vernon Fahnestock, in trust for my son Levi Fahnestock, upon the trust hereinafter mentioned. Unto my grandson William E. Fahnestock and my granddaughter Ida May Fahnestock, children of my son Walter B. Fahnestock, deceased, one-twelfth part, which I direct my executors to invest in good mortgages, real estate, or other safe securities, the interest or income of which they shall pay to the said William E. Fahnestock and Ida May Fahnestock, share and share alike, quarterly, during their natural lives, and at the death of either of them one-half of the principal shall be paid to his or her children; but in case of the death of either or both of my said grandchildren, leaving no children to survive them, his, her, or their share shall be divided among my surviving children, share and share alike ; the children of any deceased child to take the same share his, her, or their parents would have taken if living.

“Fifth. The foregoing bequests and devises to Vernon Fahnestock, trustee for Levi Fahnestock, are to be held by him on the following trusts: To invest such sum or sums as he may receive from time to time in the settlement of my

estate in such securities as in his judgment he may deem safe, and to change investments from time to time, and to pay over the income therefrom derived to said Levi from time to time during the life of my said son Levi, without the power of assignment or anticipation on the part of my said son Levi, and without liability of the principal or income for the debts, liabilities, or contracts of the said Levi, and without liability to execution or attachment by any creditor of said Levi, and on the death of said Levi leaving child or children or the children of child or children, the said income, dividends, and profits arising from the said trust to be applied to the education and maintenance of his child or children; and on the arrival at legal age of his said child or children then this trust to cease, and the principal of the same to be paid over to the said child or children, share and share alike. In the event of my child Levi dying leaving no child or children, then the principal to revert to my legal heirs in the same proportion as bequeathed to them in my said will.

"Sixth. I nominate and appoint Alexander V. Verner and my son Benjamin S. Fahnestock, executors of this my will, and I hereby give them two years after my decease for the final settlement of my estate; but in case my executors, for good and sufficient reason, require a longer time, with the consent of a majority of my heirs, the time may be extended two years."

S. Schoyer, Jr., and W. A. Schmidt, for appellant.

W. B. Rodgers and A. K. Stevenson, for appellees.

McCOLLUM, J.—This is an appeal from a decree dismissing the bill of Benjamin S. Fahnestock for the partition of certain real estate situate in the Second ward of the city of Pittsburgh, of which his father, Benjamin L. Fahnestock, who died testate, on the 3d of January, 1888, was seised in fee. It was alleged in the answer that by the provisions of the will of Benjamin L. Fahnestock there was an equitable conversion of his real estate into personalty. The case

was set for hearing on bill and answer, which together contained such portions of the will as were deemed necessary by the parties to a proper understanding and decision of the question raised. It is not contended that the words, "I hereby empower and authorize my executors to sell all my real and personal property at private or public sale, and make and execute deeds in fee simple for my real estate," standing by themselves, operate as a conversion, but it was thought by the learned judge of the court below, and it is insisted by the appellees here, that these words, taken in connection with the other provisions of the will, exhibit a clear intention and purpose on the part of the testator, that his real and personal property shall be converted into money for investment, and the collection and disbursement of interest or income, in accordance with his directions therein; and further, that it is not possible to execute the will according to its terms without such conversion of his real estate.

A mere naked power to sell real estate does not operate as a conversion of it into personalty, but such power, coupled with a direction or command to sell, will have that effect. If a testator authorizes his executors to sell his real estate, and to execute and deliver to the purchasers deeds in fee simple of the same, as in this case,—and it is clear from the face of his will that it was his intention that the power so conferred by him should be exercised,—it will be construed as a direction to sell, and operate as an equitable conversion. If, in addition to this clear intention of the testator, it plainly appears that effect cannot be given to material provisions of the will without the exercise of this power, the conclusion is irresistible that a conversion is as effectually accomplished by the will, and the duties of the executors under it are the same, as if it contained a positive direction to sell. While these principles are not disputed by the appellant, he contends that they are not applicable to this case; that the authority given to executors to sell was for the purpose of paying the debts of the testator, and, as these have been paid or satisfactorily arranged, the power

no longer exists. We cannot agree that the authority given to the executors to sell the real estate was limited in accordance with this contention. It is apparent on the face of the will that the testator intended his property, real and personal, should be converted into money, for distribution, investment, and the collection and payment of interest or income as he had directed. It is true that he provided in his will that the beneficiaries named therein might become purchasers in the manner prescribed by him of portions of his property, and receive from his executors deeds in fee simple of the real estate, and proper transfers of the personal property so purchased by them. But this was a privilege which they have not exercised, and we merely refer to it now as showing that the testator did not intend they should take title to any portion of his real or personal property except as purchasers of it from his executors.

It is not possible to execute certain provisions in the third and fourth clauses of the will without a conversion of the real estate, as well as the personal property, into money. In the one-third of his real and personal estate given to his widow during her life his grandchildren William E. Fahnestock and Ida May Fahnestock have, under the third clause of the will, a one-twelfth part, which his executors are required to invest in good mortgages, real estate, or other safe securities, and to pay over to the said William E. Fahnestock and Ida May Fahnestock the interest or income thereof quarterly, share and share alike, during their natural lives. In the residue of his real and personal estate his son Charles H. Fahnestock is given by the fourth clause of the will a one-twenty-fourth part, to be invested by the executors in mortgages or other safe securities, the interest of which is to be applied by them to his support, in case the United States government shall cease to care for or support him; and William E. Fahnestock and Ida May Fahnestock have a one-twelfth part, to be invested, and the interest or income of it to be paid to them, by the executors, in the manner and during the period provided for in the third clause already referred to.

As there can be no final settlement of the estate in accordance with the will until the power conferred upon the executors for the sale of real and personal property is exercised, there should be no further delay in the execution of it. This power was not destroyed by the default of the executors. It survived their failure to exercise it within the four years allowed by the sixth clause for a final settlement of the estate. During that period they had some discretion as to the time of its exercise, but they have none now. The specifications of error are not sustained.

Decree affirmed, and appeal dismissed, at the costs of the appellant.

HAYES *vs.* PRATT.

[147 U. S. 557.]

CHARITABLE TRUSTS — ADMINISTRATOR C. T. A. — FOREIGN EXECUTOR—EQUITY JURISDICTION—FEDERAL COURTS—JUDGMENT.

- A devise to executors, in trust, "for the purpose of founding and supporting, or uniting in the support of any institution that may then be founded, to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics" is a valid charitable trust, notwithstanding the authority to appropriate the fund to an institution established after the testator's death.
- The will naming two executors and providing for the substitution of two others in the event of the death of either or both of the two first named, no other person can execute the trust so long as any one of the four is living and has not declined the office of executor.
- Though the two executors named in the will residing in different states each proves the will in the state of his residence and assumes the management of the property of the estate in that state that does affect the duties of the trustees, nor that of the court to have the trust executed according to the testator's intentions.
- The trust is such a personal confidence reposed by the testator in the persons named, that if they should all die before its full performance it would probably not pass to the administrator with the will annexed, even if he

should be deemed to be vested with the title to the real estate devised, but would have to be executed by a trustee specially appointed for that purpose.

An administrator with the will annexed appointed in the state not of testator's domicile, who after settling his account in the court which appointed him, pay over to an institution not entitled to receive it, money received from the income and sale of lands devised to the executors, is accountable therefor with interest from the date of settling his account, the payment having been made without any order of court and with notice of the claim of the substituted executor, and the administrator having taken a bond of indemnity from the institution.

The substituted executor appointed in the state of testator's domicile is the only party entitled to recover such money, and the joinder of the beneficiary of the trust as a party plaintiff is unnecessary, if not improper.

The judgment in such an action should direct payment to the executor as such and not as treasurer of the corporation which is the beneficiary of the trust.

An executor appointed in another state may sue in New Jersey without taking out letters in that state, on filing in the office of the clerk of the court an exemplified copy of the record of his appointment as required by Act. N. J. 1879, c. 16.

The New Jersey statutes conferring jurisdiction on the Orphans' Court do not affect the jurisdiction of the Chancery Courts over the settlement of estates.

Such statutes cannot have the effect of defeating or impairing the general equity jurisdiction of the Circuit Court of the United States to administer as between citizens of different states, the assets of a deceased person within its jurisdiction.

APPEAL from Circuit Court of the United States for the district of New Jersey.

Bill in equity by Dundas T. Pratt as executor of the last will and testament of George Hayes, deceased and the Hayes Mechanics' Home, against Henry Hayes, administrator with the will annexed of George Hayes, deceased, for an account of the property received by him, and for payment to either of the plaintiffs as the court may direct.

The defendant appealed from the judgment of the Circuit Court that he pay to the complainant Dundas T. Pratt, treasurer of the Hayes Mechanics' Home, and for and in behalf of said corporation, the sum of \$5,153.27, with interest from January 10, 1884, being the balance in his hands,

as administrator aforesaid, on settlement of his account in the Orphans' Court, of Essex county, N. J., with costs.

A. Q. Keasbey, for appellant.

John R. Emery, for appellees.

Mr. Justice GRAY delivered the opinion of the court.

George Hayes, by his will, devised and bequeathed the residue of his estate, real and personal, to his executors, in trust to sell and invest at their discretion, "and to appropriate and use the principal or income thereof, for the purpose of founding and supporting, or uniting in the support of any institution that may be then founded, to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics."

The primary, if not the only, intention of the testator, evidently, was that his bounty should go to a single institution, "a retreat and home for disabled or aged and infirm and deserving mechanics," either by founding, as well as supporting, a new institution, or by aiding in the support of one founded by others. The validity of the charitable trust is undoubted, notwithstanding that the trustees might appropriate the fund to an institution established after the testator's death. (*Jones v. Habersham*, 107 U. S. 174, 191, 2 Sup. Ct. Rep. 336; *Curran's Appeal*, 4 Penny. 331; *Taylor v. College*, 34 N. J. Eq. 101.)

The execution of this trust was committed by the testator to the executors named in the will,—first, to Jabez W. Hayes and Lewis E. Wells, and next in the event of the death of either or both of these, to Dundas Pratt and Horace H. Nichols, successively. So long as any one of the four is living, and has not declined the office of executor, or been shown to be unsuitable, no other person can execute the trust. And it is doubtful, to say the least, whether the trust is not such a personal confidence reposed by the testator in the persons named that it would in no event pass to an administrator with the will annexed, but must,

if all those named in the will should die before full performance of the trust, be executed by a trustee specially appointed for the purpose. (*Ingle v. Jones*, 9 Wall. 486, 497, 498.)

Of the two executors first named, Jabez W. Hayes, being a citizen of New Jersey, and Lewis E. Wells, a citizen of Pennsylvania, each proved the will, and took out letters testamentary in his own state and assumed the care and management of the property in that state, and Wells, also took control of the property in Michigan. But such an arrangement, however, convenient, cannot affect the duty of either or both of the executors, or of the court, to see that the trust is carried out according to the testator's intention.

The testator was born, and for many years lived in New Jersey, but his domicile at the time of his death and for ten years before was in Pennsylvania. A small part only of his property was in New Jersey, and the greater part was in Pennsylvania and Michigan. The Hayes Mechanics' Home was incorporated within thirteen months after his death by his partner, by Wells, his Pennsylvania executor, by Pratt, now his executor, and by other citizens of Pennsylvania, under the laws of that state, for the purpose of founding and supporting "a retreat and home for disabled, aged, or infirm and deserving American mechanics," as contemplated in his will. Wells settled his account as executor in the proper court of Pennsylvania, and paid over the balance of personal property in his hands to the Hayes Mechanics' Home, and also, by order of that court, conveyed to that corporation the lands in Pennsylvania and in Michigan; and the validity of the payment and conveyance has not been impugned. In short, the whole of the residue of the testator's property, real and personal, except the comparatively small amount now in controversy, has been appropriated, with the approval of the legislature and of the courts of his domicile, in a manner to carry out his charitable intent in accordance with the letter and spirit of his will.

Jabez W. Hayes, the executor appointed in New Jersey, died in January, 1882, having done nothing towards carrying out the charitable intent of the testator, beyond obtaining the advice of counsel that the executors (not that he alone) might lawfully appropriate the property in New Jersey to the support of the Hospital of St. Barnabas, in Newark.

After his death, Henry Hayes was appointed by the Orphans' Court in New Jersey to be administrator of the unadministered "goods, chattels, and credits" of George Hayes in New Jersey. As already indicated, it is difficult to see how this appointment could give him any title in or power over the real estate devised to the executors in trust. But, if it can be treated as vesting in him the title to the real estate in New Jersey, it certainly did not authorize him to undertake the performance of the charitable trust created by the will, so long as Pratt, one of the alternative executors and trustees therein named, was still alive, had never declined the trust, and had not even known, until recently, of the existence of any estate of the testator not already disposed of according to his will.

Moreover, to apply the fund received by the defendant from the sale of real estate in New Jersey to the maintenance of a free bed in the Hospital of St. Barnabas, under the charter and rules of that institution, would be much less in accord with the intention of the testator, as expressed in his will, than to add this fund to his other property already devoted to the foundation and support of the Hayes Mechanics' Home.

Both of the original executors being dead, and Pratt, the successor next named in the will, having been appointed sole executor in their stead, he is the only person authorized to execute the charitable trust of the testator, so far as anything remains to be done with regard to it.

It was objected that Pratt, as executor appointed in Pennsylvania, could not sue in New Jersey without taking out letters testamentary in that state. But this objection is answered by the statute of New Jersey of 1879, c. 16,

which enacts that "any executor or administrator, by virtue of letters obtained in another state, may prosecute any action in any court of this state without first taking out letters in this state; provided, such executor or administrator shall, upon commencing suit, file in the office of the clerk of the court in which such suit shall be brought an exemplified copy of the record of his or their appointment,"—which has been done in this case. (Acts of N. J. 1879, p. 28; *Lawrence v. Nelson*, 143 U. S. 215; 12 Sup. Ct. 440.)

It was further objected that since the Orphans' Court had been vested by the statute of New Jersey of 1872, c. 340, with the power, upon allowing the accounts of executors, or of administrators with the will annexed, to order distribution of the residue in accordance with the will, application should have been made to that court. (Acts of N. J. 1872, p. 47.) But the statutes of the state conferring jurisdiction upon the Orphans' Court do not even affect the jurisdiction of the Court of Chancery of New Jersey over the settlement of estates. (*Frey v. Demarest*, 16 N. J. Eq. 236; *Coddington v. Bispham*, 36 N. J. Eq. 224, 574; *Houston v. Levy's Ex'r*, 44 N. J. Eq. 6; 13 Atl. Rep. 671.) Certainly, no such statutes can defeat or impair the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction. (*Green's Adm'x v. Creighton*, 23 How. 90; *Payne v. Hook*, 7 Wall. 425; *Lawrence v. Nelson*, 143 U. S. 215; 12 Sup. Ct. Rep. 440.)

The defendant, as administrator with the will annexed of George Hayes, having received money from the income and sale of his real estate, and settled his account therefor in the court which appointed him, and having, without any order of court, and without right, and with notice of Pratt's claim, paid the money to the Hospital of St. Barnabas, taking from that corporation a bond of indemnity, was rightly held liable to account for it, with interest from the date when he so settled his account, after having determined so to pay it.

There being no one in New Jersey having any right to or claim upon this fund, and no special reason being shown for administering it in New Jersey, it should, upon familiar principles, be transmitted to the executor appointed at the testator's domicile, for distribution. (*Wilkins v. Ellett*, 9 Wall. 740, 742; *Harvey v. Richards*, 1 Mason, 381, 412, 413; *Normand's Adm'r v. Grogard*, 17 N. J. Eq. 425, 428.)

Pratt, being the executor appointed in the state of the testator's domicile, and the trustee charged with the administration of the charitable trust, is the only person entitled to maintain this suit. The joinder of the Hayes Mechanics' Home as a plaintiff was unnecessary, and perhaps improper; but not having been objected to, by demurrer or otherwise, in the court below, it affords no ground for refusing relief. The decree of the Circuit Court is irregular, in that it directs payment to be made to Pratt as treasurer of the Hayes Mechanics' Home, instead of to him as executor, and is therefore to be amended in that particular, and, so amended, affirmed.

Mr. Justice SHIRAS, not having been a member of the court when this case was argued, took no part in its decision.

As to the validity of charitable bequests to non-existent institutions, see cross-reference note to *Tilden v. Green*, *supra*, p. 80.

MARY A. H. COX *et al.*, Executors of Lydia H. Leeds, Deceased, Appellants, *vs.* HANNAH WILLS *et al.*, Respondents.

[49 N. J. Equity, 573.]

TRUST—FOR MAINTENANCE—COMMINGLING FUNDS—COSTS.

A bequest to testator's wife "in good faith believing that she will make a will and thereby distribute so much of the legacy among my nearest relatives as she may not use for comfortable maintenance, and it is my will that" she shall make such disposition, is not an absolute gift but creates a trust in her own favor as to so much as she may need for her comfortable maintenance and as to the balance in favor of the husband's next of kin.

The widow having, without fraud, mingled this trust property with her own, equity will, after her death, separate them and charge the expense of her comfortable maintenance on the husband's estate, imposing the burden of separation on her representatives.

Permanent improvements made by her on the homestead will be charged to her separate estate, but an allowance made for ordinary repairs and the expense of preserving the property.

Costs and expenses of the suit are properly charged to the joint fund.

APPEAL from Court of Chancery.

Bill by Mary A. H. Cox and others, executors of the will of Lydia H. Leeds, for construction of the will of John Leeds, deceased. That portion of the will involved in the question is as follows: "Item—I give unto my beloved wife Lydia H. Leeds five hundred dollars to be considered in lieu of certain moneys she gave me upon our marriage, and further, I give my said wife all such of my household goods and kitchen furniture as she may think proper to take.

"And further, my will is, and I order and direct my executors and executrix hereinafter named to make sale of all my farm whereon I now dwell together with all my other lands not given away at such times as they may think proper and to make and execute good and sufficient deeds of conveyance for the same, and my said executors are also required to make sale of my personal estate and with the proceeds thereof to pay my said debts and legacies aforesaid so far as the same can be so paid off and satisfied and the

remainder of my said debts and legacies not satisfied by the proceeds of the sale of my said personal property is to be paid and satisfied out of the proceeds of the sales of my real estate.

“And all the balance of said sales not required to pay my said debts and legacies aforesaid, I do hereby give and bequeath unto my beloved wife Lydia H. Leeds to be paid to her as soon as conveniently can be after my said debts and legacies are paid and satisfied, which said last named legacy I give my said wife in good faith, believing that she will make a will and thereby distribute so much of the last named legacy among my near relatives as she may not use for comfortable maintenance and it is my will that my said wife shall make such distribution.” The Vice Chancellor held that this created the wife a trustee of the residue and its earnings—first for her own benefit, to the extent that she might need it for her comfortable maintenance and after her death for the testator’s next of kin, and that having taken possession of the residue and mingled it with her own separate estate, and invested both in her own name, the husband’s next of kin were at her death entitled to such proportion of the entire property left by her, as the residue of the husband’s estate at his death bore to the sum of that residue, and that the costs should be paid out of the residue of Mrs. Leeds’ estate.

Complainants appealed from this decree.

Charles E. Hendrickson, for appellants.

Mark R. Sooy, for appellees.

SCUDDER, J.—The true construction of the will of John Leeds, deceased, was properly determined by the decree in this cause, holding that the widow took a trust title in the residue of his estate, and that it did not make an absolute disposal thereof to her; but the decree should be modified and changed as to the accounting in the settlement of her estate, and the distribution of the funds in her hands at

her death. This is necessary to fulfill the purpose of the testator that she might use for her comfortable support so much as was reasonable and sufficient for her living expenses. The testator's personal property at the time of the settlement of his estate, December 1, 1868, amounted to the sum of \$4,052.63, after paying to his wife a specific legacy of \$500, and excluding the household goods bequeathed to her. He also owned the house that they occupied, which continued in her possession until her death. She survived him twenty-one years. It appears that her separate property, including the legacy of \$500, amounted to about \$1,300. They were childless. She was the special object of his bounty, and the only beneficiary named in his will. After her husband's death she received and invested all his money, mingling it with her own, and used the interest from the investments for her support. At her death the inventory of her estate, thus mingled, amounted to \$8,626.12, and on final settlement there remained \$7,445.10, besides household furniture, which she divided among legatees by her will. The contest is between these legatees, represented by the complainants, who are the executors of her will, and the defendants, who are the next of kin of the husband, John Leeds, deceased. There is no question as to the homestead dwelling house, which was purchased by John Leeds after his will was made, and goes to the husband's next of kin, at the wife's death, as part of the residue of his estate; nor is there any dispute as to her manner of living, which was careful and economical. It was within the amount of a reasonable and comfortable maintenance, according to the testimony of all the witnesses who have testified.

That she should have kept the trust fund received from her husband's estate separate from her own, and charged the expenses of her maintenance to this fund, is now evident; but, by mingling this with her own, she incurred no penalty or forfeiture, without fraud, of which there is no pretense in the case. (*Pratt v. Douglass*, 38 N. J. Eq. 516-540.) Equity will follow and separate them, and will put

upon the trustee the burden of distinguishing what is his. (*Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54; *Perry, Trusts*, § 447.) It is evident that she supposed the bequest of the residue of the estate by her husband's will gave her an absolute title, and this seems to have been so doubtful to the minds of those who are settling her estate that they have called upon the court to remove the uncertainty before they will make distribution. What she has not done the court must now do, and there is no difficulty on the proofs that have been offered in stating the accounts, showing her receipts from the investments of moneys belonging to her husband's estate, and the amount she has used for her comfortable maintenance, from the time the balance came to her hand, as trustee, on the settlement of the final account in the Orphans' Court. If there is any doubt as to the reasonableness of her expenditures, further proofs may be taken on reference to state the account. Her own estate and its accumulations, by this accounting, will be separated from the general funds in the hands of the executors of her will, and can be distributed under it.

In stating the account, no credit should be allowed to her estate for permanent improvements put on the building by her, while in her occupation, after her husband's death; though an allowance may be made for repairs, necessary to her comfort, and for preserving the property, to a reasonable amount. (*Pratt v. Douglass*, 38 N. J. Eq. 542.)

As the difficulty in settling the estate of Lydia H. Leeds, which has led the complainants, executors of her will, to file this bill for the direction of the court, has been caused by the will of John Leeds, deceased, and a reasonable doubt of its true meaning, and the proper method of accounting under it, as well as by the intermingling of the trust fund, the costs should be paid out of the money in the hands of these executors, and reasonable counsel fees allowed, before any account is stated between the parties.

The decree will be reversed, and a reference ordered, according to the views above expressed. For reversal *DEPUE*,

DIXON, MAGIL, REED, SCUDDER, VAN SYCKEL, GENTY, BOGERT, BROWN, CLEMENT, SMITH, WHITTMAN. For affirmation, none.

ANNIE P. CALLOWAY et al. vs. W. S. COOLEY et al.

[50 Kansas, 743.]

FOREIGN EXECUTORS—CONVEYANCES—CONSTITUTIONALITY OF
LAW—AUTHENTICATION OF FOREIGN WILL

The subject of Chapter 102, Laws, Kansas, 1879, is sufficiently stated in its title "An act to authorize foreign executors and administrators with the will annexed to convey real estate in pursuance of power contained in the will" though it relates to executors and administrators in other of the states and territories and not those of foreign nations.

The act providing for wills theretofore or thereafter executed and proved applies as well to wills proved before its passage as to those theretofore executed but which had not yet taken effect by the death of the testator.

The probate court of a county in which real estate of a non resident testator is situated, having found and adjudged that the authentication of the copy of the will presented to it for record is sufficient, this adjudication is not subject to collateral attack.

ERROR from District Court, Lyon county.

Ejectment by Annie P. Calloway and others, the surviving heirs of James Calloway, deceased, to recover eighty acres of land of which said James Calloway died seised, against W. S. Cooley and others who claim under a deed by the executor of said James Calloway, deceased, executed under a power of sale contained in the will. To a judgment for defendants plaintiffs bring error.

J. Jay Buck and *J. G. Hutchinson*, for plaintiffs in error.

L. B. Kellogg and *C. N. Sterry*, for defendants in error.

JOHNSTON, J.—The validity of the judgment is to be determined from the findings, as none of the testimony has

been preserved. From them it appears that the title of the land in controversy was in James Calloway, who died in North Carolina, and the executor of his will, who was vested with full power, sold the land in good faith, and for a reasonable price, and accounted for the proceeds of the sale to the estate and heirs of the deceased. The Calloway heirs, without tendering or offering to restore the purchase price of the land, or any part of it, have brought this action to recover the land, contending that the sale was irregular and unauthorized. The will was executed and proved in North Carolina, and the executor, in pursuance of the authority conferred by chapter 102 of the Laws of 1879, brought a copy of it to Kansas, and presented it for record in the Probate Court of Lyon county, where the land was situate. That court determined that it was a duly-authenticated copy of the will, which had been executed, proved and admitted to probate, according to the laws of North Carolina; that the authentication was in due form of law, and entitled to full faith and credit,—and, having found these facts, admitted it to record. The plaintiffs contest both the applicability and the validity of the statute mentioned, under which the foreign executor derived authority to sell the land. (Gen. St. 1889, par, 2932.) It is claimed to be inapplicable because it was enacted after the will had been executed and proved. It provides:

“Whenever, in any will which heretofore has been or hereafter shall be executed and proved in any state or territory of the United States, power is given to the executor or administrator with the will annexed to sell or convey real estate of the testator, any executor of such will, or administrator with the will annexed of the estate of the testator, duly appointed and qualified in any state or territory of the United States in which such will shall have been executed and proved, may sell, etc.”

Counsel for plaintiffs in error contend that “the obvious intent of the legislature was to make the statute operative as to wills already executed, but which had not yet taken effect through the demise of the testator, and the proving

of the will, but not to wills where the testator was already dead, and his will had taken effect by being proved according to law, and all property rights thereunder, or that had passed by descent, had vested. The statute is to be read, 'which heretofore has been or hereafter shall be executed and proved,' and not, 'executed and approved.'" The language of the statute appears to us to be so plain, and the intention of the legislature so obvious, that there is little room left for interpretation. It is clear that it was intended to apply to all wills which had been executed and proved prior to its enactment, as well as to those which were executed and proved afterwards, and fairly covers the will in controversy.

It is contended that the statute is obnoxious to section 16 of article 2 of the constitution, because the subject of the act is not clearly expressed in its title. The title is, "An act to authorize foreign executors and administrators with the will annexed to convey real estate in pursuance of power contained in the will." It is said that the act relates to executors and administrators in other of the states and territories of the United States, while the title indicates executors and administrators of other nations. The word "foreign" is frequently used as the opposite of "domestic." In the statutes and decisions the judgments and wills of other states are generally spoken of as foreign judgments and wills. This was the sense in which it was used by the legislature, and as it will admit of a meaning such as was given to it by the legislature, and broad enough to include the provisions of the act, it cannot be held invalid. (*In re Pinkney*, 47 Kan. 89; 27 Pac. Rep. 179.)

It is argued that it is obnoxious to section 17 of article 2 of the constitution, but we find nothing substantial in the claim, nor in any of the other objections made to the validity of the statute.

It is next contended that the authentication of the will was insufficient, and that, therefore, the plaintiffs' motion for judgment on the findings should have been allowed. The authentication appears to be substantially correct, but,

its sufficiency having already been adjudged by a competent tribunal, it is not before us for decision. It appears from the findings that an application was made in the Probate Court of Lyon county, by the executor, to have a copy of the will admitted to record in that court, and, upon a hearing duly had, it was found that the will presented was a duly-authenticated copy of the will of James Calloway, deceased; that it had been executed, proved, and admitted to probate according to the laws of North Carolina; and that the authentication thereof is in due form of law. It was further found that the will related to property in Lyon county, Kan., and upon these findings an order was made that the authenticated copy of the will be admitted to record in that court, and duly recorded. The Probate Court is vested with full power to inquire into the sufficiency of the authentication, and to ascertain whether, under the proof offered, the will should be admitted to record. Being vested with jurisdiction, its finding and determination are final, unless corrected upon appeal or proceedings in error, and are not subject to collateral attack.

The statutes provide that the existence of certain facts are necessary before a will executed and proved in another state can be admitted to record in this state. One of the requisite facts is that the copy of such will, presented for record, shall be duly authenticated. This fact is to be determined upon proof, and the authority to determine it is conferred upon the Probate Court. (Gen. St. 1889, pars. 2932, 7228.) Anything indicating a contrary view in *Gemmell v. Wilson* (40 Kan. 764; 20 Pac. Rep. 458), is not controlling, as in that case the existence of the requisite facts to admission to the record were conceded. Under the statutes these requisite facts must be determined by the Probate Court; and, it having exercised the jurisdiction, its determination, although it may have been erroneous, is conclusive upon all interested parties, and all courts, until it is reversed or reviewed in some appropriate proceeding. (*Stanley v. Morse*, 26 Iowa, 454; *Roberts v. Flanagan* [Neb.], 32 N. W. Rep. 563; *Loring v. Arnold* [R. I.], 8 Atl. Rep.

335; *In re Schoenberger's Estate* [Pa. Sup.], 20 Atl. Rep. 1050; *Goldtree v. McAlister* [Cal.], 23 Pac. Rep. 208; *Dickey v. Vann* [Ala.], 8 South. Rep. 195; *Holmes v. Railroad Co.*, 9 Fed. Rep. 229. See, also, *Howbert v. Heyle*, 47 Kan. 58; 27 Pac. Rep. 116; *Higgins v. Reed*, 48 Kan. 272; 29 Pac. Rep. 389.) A duly-authenticated copy of the will having been properly admitted to record, the executor was authorized to sell the property in controversy, and to confer a good title upon the purchaser. We are clearly of opinion that the purchaser from the executor acquired a good title, and that the plaintiffs in error suffered no injustice by reason of the conveyance. The judgment of the District Court will be affirmed.

HORTON, C. J., concurring. ALLEN, J., not sitting.

As to the conclusiveness of judgments and orders of probate courts, see *Lyne v. Sanford*, *supra*, p. 26; *Moore v. Moore's Estate*, *supra*, p. 100; *Palmerton v. Hoop*, *supra*, p. 222; *Shelton v. Hadlock*, *supra*, p. 289.

MARY A. POTTER, Respondent, *vs.* THOMAS L. OGDEN *et al.*,
Executors, etc., Appellants.

[186 New York, 384.]

ADMINISTRATOR'S BOND—ENFORCEMENT—DECREE ON ACCOUNTING—APPOINTMENT OF SPECIAL GUARDIAN—SERVICE OF CITATION ON INFANT—APPOINTMENT OF GUARDIAN.

A surrogate's decree reciting the death of an administrator without having paid or accounted for the share of a certain distributee and that his administrator could find no assets of either the original intestate or of her administrator, and directing payment to the distributee out of the assets of the original intestate, is sufficient to fix the liability of the sureties on the bond of the first administrator.

Such decree is evidence against the sureties, under Code Civ. Pro. N. Y. § 2606, giving the surrogate the same jurisdiction to compel the representatives of deceased executors, etc., to account as he would have had against the decedents if their letters had been revoked, and it is immaterial that the bond was given before that chapter of the code went into effect, § 2610 providing that the chapter shall apply to executors previously appointed, but shall not affect the liability of sureties on bonds previously given.

Payment by an administrator to himself as guardian of an infant distributee pursuant to a decree void as to her, is not a defense in favor of the sureties on his bond as administrator.

The statement of the administrator's account signed by him and filed in that proceeding, is available to the distributee as an acknowledgment of the amount due to her without binding her to any responsibility for the decree entered.

The appointment of a special guardian for an infant distributee in proceedings in a surrogate's court before the service of the citation on the infant in the manner prescribed by law, is a nullity.

If such appointment is not absolutely void and merely voidable, the election of the distributee is made in time, if made when the decree in the proceeding is first sought to be used adversely to her.

A motion made by the distributee after the decree had been amended in certain particulars, to amend it in other respects, if it binds her by the decree at all, does so only as it is amended and not as originally entered.

Service of citation from a New York Surrogate's Court made on an infant in Canada is a nullity under a statute directing personal service and giving no permission to go without the state.

The service of a citation on an infant seven or eight years of age without service of a copy on the parent, guardian or, in default of these, on the person with whom the infant resides is insufficient, as well under the rule in equity, which prior to 1874 was followed in the surrogate's courts, as under chapter 156 of the Laws of that year regulating the service of citations on minors and the appointment of special guardians for infants.

Service of a citation by publication without mailing a copy is ineffective.

The rule that the conclusion of the surrogate as to the sufficiency of the service of the citation saves his jurisdiction, has no application when the record shows the absence of every fact essential to complete the service.

An entry in the surrogate's book of minutes ordering that a certain person be appointed general guardian of an infant on executing a prescribed bond, and another entry simply ordering his appointment, both signed by the surrogate, an unsigned appointment in the guardian book, unsigned letters of guardianship and the approval of the bond by the surrogate are insufficient as evidence of the appointment of the guardian.

APPEAL from Supreme Court, General Term, First Department.

Action by Mary A. Potter against Thomas L. Ogden and

others, executors of Samuel E. Lyon, deceased, on the bond of John W. Mills, as administrator of the estate of Abigail Hall, deceased. The complaint was dismissed, and plaintiff's motion for a new trial was ordered to be heard on exceptions at General Term in the first instance. From the order of the General Term sustaining the objections, and granting a new trial, defendants appeal.

Henry R. Beekman, (John E. Parsons, of counsel), for appellants.

C. Carskaddan, (John D. Kernan and William P. Quin, of counsel), for respondent.

FINCH, J.—In the childhood of the plaintiff, and when she was about six or seven years old, her grandmother died, leaving an estate, the infant's distributive share of which was something over \$10,000. The law, as usual, undertook to preserve it for her in pity for her incapacity, but was unfortunate both in the choice of its agents and the ultimate results of the control which it asserted. The child, grown up to womanhood, asks the court whose ward she has been for the property which it kept from her hands, and is told that it is utterly lost and wasted ; that possibly one of two groups of sureties may be liable for it ; and that she is at liberty to ascertain which, and sue for her inheritance. I approach the questions involved, therefore, impressed with the abstract justice of the plaintiff's demand, and with a conviction in which we all share that somebody is and should be responsible to her for the restoration of her property.

Her grandmother's estate passed into the hands of John W. Mills and Jane E. Keleman, as administrator and administratrix, who were duly appointed by the surrogate of Westchester county, on June 10, 1872. They gave a joint and several bond, in the usual form, conditioned for the faithful performance of their duties, upon which Samuel E. Lyon, defendants' testator, became liable as one of the sureties. Mills died in 1884, insolvent, and unable to pay his

debts ; and, in September of 1889, Charles A. Hall was appointed administrator of his estate, and, after duly qualifying, entered upon the performance of his duties. In 1890 the plaintiff, who had become of age, called him to account for the unadministered estate and assets of her grandmother, Abigail Hall, for which Mills was alleged to have been responsible at the date of his death ; and a decree was entered in the Surrogate's Court of Westchester county, in and by which it was found and adjudged that Mills died before the estate of Abigail Hall in his hands was fully administered ; that there was due and unpaid to the plaintiff from him, as administrator, the sum of \$11,188.23 on the 2d day of May, 1877 ; that the same was never paid over or accounted for by him as such administrator ; and that, after his death, his administrator had and could find no assets either of the Hall estate or of the intestate, save about \$100 in household furniture. The accounting thus showed that the estate of Abigail Hall and that of Mills were each a total wreck. The decree formally adjudged payment to the plaintiff out of the assets of Abigail Hall, deceased. The plaintiff testified that nothing had ever been paid to or received by her on account of her distributive share, and thereupon rested her case. She had fully established *prima facie* a right of recovery against the sureties. The appointment of Mills as administrator, the execution of the bond, his receipt and possession of the estate, the amount of his liability to plaintiff for her distributive share, his neglect to pay it over, his total waste of the whole fund, and his own utter insolvency, had all been established by competent evidence, when the plaintiff rested and showed a *devastavit*. for which the bondsmen of the administrator were liable.

The burden of a defense was thus shifted over to them, and they met it in two ways : First, by an attack upon the sufficiency of the method adopted to prove a *devastavit* ; and, second, by the affirmative defense of payment to the general guardian of the infant.

It was contended that the provisions of the Code of Civil Procedure which were followed and adopted by the plaintiff

in establishing a *devastavit* have no application to a case where the bond was given before the enactment of the Code, and when another and different process was required. The change, however, was a mere alteration of the remedy affecting only the practice to be pursued, and the method in force when the remedy is sought is the one to be followed, unless the statute enacts to the contrary. There is no vested right in a rule of evidence. (*People v. Ryder*, 124 N. Y. 500 ; 26 N. E. Rep. 1040 ; *People v. Turner*, 117 N. Y. 233 ; 22 N. E. Rep. 1022). And the change in the present case is merely on the proof necessary to establish a *devastavit*. Under the old practice, in the lifetime of the administrator, it was the return of a sheriff that no property could be found to satisfy the execution against him ; under the new, after his death, it is the decree of the surrogate on the accounting of the successor. But, without disputing the general doctrine, the contention here is that section 2606 of the Code, under which this action is brought, has no application to the bond in controversy, because section 2610 expressly enacts : " The provisions of this article apply to an executor, administrator, or guardian to whom letters have been issued, and to a testamentary trustee whose trust has been created before this chapter takes effect, except that it does not affect in any manner the liability of the sureties in a bond executed before this chapter takes effect." Of course, as the general term suggests, the exception would repeal utterly the provision to which it is annexed if by " liability " was at all meant the method of enforcing such liability. There were in the article some new provisions apparently extending the liability of executors, and administrators, to meet which the exception was deemed necessary, but the terms of section 2606 relate wholly and exclusively to the remedy, and in no manner alter the original liability upon the bond. The sureties, before the Code, were liable for a *devastavit* of the administrator, and are liable for exactly the same thing now, the mode of proving it alone having been changed. Before the Code, the return of an execution *nulla bona*, issued in the

lifetime of the administrator, would have been sufficient evidence of a waste of the assets ; after his death, instead of a suit in equity, a decree against the successor in administration is given the same effect. In both cases the person who would have had the assets if there had been no waste is shown not to have them, and whether that appears from the return of a sheriff, in the lifetime of the delinquent, or from the accounting of his successor after his death, the result is the same, and one is no more conclusive than the other. It is a question only of remedy and of procedure.

But it is further said that the surrogate's decree against the successor of Mills was insufficient, because it decreed payment out of the assets of Abigail Hall. Its office was to determine whether, at the date of Mills' death, any such assets remained. If they did, they were presumed to have come to the hands of the successor, and a decree on his accounting that they had not was a necessary preliminary. (*Perkins v. Stimmel*, 114 N. Y. 359 ; 21 N. E. Rep. 729.) Such fact the decree adjudged and determined, and, beyond that, established that there were no assets of either estate in the hands of the administrator of Mills. So long as there was nothing to reach, and the decree showed that fact, a further formal judgment, in addition to the substantial one against the assets of Mills, would have been useless for any purpose.

Beyond these special objections lies the real field of the controversy. The sureties claim that the distributive share of the plaintiff was in the hands of Mills as administrator intact and undiminished, on the 2d day of May, 1877, and, on that day, in pursuance of the order of the surrogate, was transferred by himself as administrator, to himself as general guardian of the plaintiff, whereby he was discharged as administrator, and his sureties in that character released, and that he then became further bound as guardian, so that the plaintiff's proper and only recourse is upon the guardian's bond. That is practically a plea of payment,—a defense that the debt due plaintiff from the administrator was discharged by payment to her legally ap-

pointed and properly authorized representative. The burden of proof necessarily rests upon the surety. He stands charged, and must establish his discharge by proof of the alleged payment, or fail of his defense. His reliance is upon the decree of the surrogate of Westchester county rendered upon the final accounting of Mills. There is a reference to that proceeding in the complaint, which recites its existence as a matter of fact, but makes no admission of its authority or force as an adjudication. The statement of his account, signed by Mills, was available to the plaintiff as an acknowledgment by him of the amount due to her, without at all involving any responsibility for the surrogate's ultimate decree. When offered as an adjudication binding upon the plaintiff, it was objected to as immaterial and incompetent, and not binding on her unless it is shown that jurisdiction over her had been acquired, and the same objections are urged upon this appeal. The surrogate's court is one of limited and special jurisdiction, and has and can assert it only in accordance with statutory provisions, except as to powers properly incidental thereto. The plaintiff, at that time about seven or eight years old, was represented on the accounting by William M. Skinner, the surrogate's clerk,—an act very properly prohibited by later legislation,—but his appointment was nugatory and ineffective, unless first the infant was brought into court, and jurisdiction over her acquired, by the service of a citation in the manner prescribed by law. (*Ingersoll v. Mangam*, 84 N. Y. 622; *Davis v. Crandall*, 101 N. Y. 321; 4 N. E. Rep. 721; *Crouter v. Crouter*, 133 N. Y. 56; 30 N. E. Rep. 726.) In each of these cases it is explicitly held that there is no jurisdiction to appoint a special guardian for an infant until such infant has been brought into court by the service of process, in the manner required by law. Until then there is no jurisdiction over the person of such defendant, and the prior appointment of a special guardian is an absolute nullity. The record in this case shows that the appointment of Skinner was made on the 19th day of February, 1874. That was the day on which the citation

was issued, for that is the date which it bears. It was personally served on the minor in Canada, on February 25, 1874, and proof of service sworn to three days later ; and so the appointment is shown by the record to have been made before any service upon the infant, and when the court had acquired no jurisdiction over her. If it be said that the appointment, though premature, was preliminary, and became good when filed, and after due service on the minor, there are two answers. We have never, so far as I can discover, gone further in such a case than to hold the decree voidable at the election of the minor. (*Crouter v. Crouter, supra*), and that election was made by her when, for the first time the decree in its original form, was sought to be used against her. The clause in it injurious to her was stricken out during her minority, and she had no occasion to resist it until it was sought to be used adversely. But a second answer is that there never was any valid service upon the infant at any time, so that, as against her, the decree was not merely voidable, but absolutely void, and no power to appoint a special guardian ever accrued.

The proof of service contained in the record is as follows : First, an affidavit of John Hall, Jr., who describes himself as a brother of the plaintiff, that he served the citation on Mary Agnes Hall, by delivering a copy to her, and showing her the original at Camden, in the province of Ontario, Canada, where she was temporarily attending school, and that her residence was with her father in the county of Oneida, in this state ; second, affidavits of publication in a newspaper printed in Westchester county for a period of five weeks, and in the state paper at Albany for three months. No other evidence or proof was given, and the asserted jurisdiction must stand or fall upon that which the record discloses. I think it was clearly insufficient for several reasons. Service upon the child in Canada was inoperative, because made outside of the jurisdiction, and in a foreign country, to which the process of the court could not run. Such a service is void and null at common law, *Litchfield v. Burwell*, (5 How. Pr. 346) ; *Jones v.*

Jones, (108 N. Y. 424; 15 N. E. Rep. 707), and never available, except where the statute explicitly permits it as such, and makes it effective by special enactment or authority. The statute in force on the date of this service gave no such authority. (3 Rev. St. 6th ed. p. 101, section 74.) It merely directed a personal service, which of course could only mean within the jurisdiction, since no permission was given to go outside of it, and validating the otherwise void service. Nor was there any proof of service of the copy of the citation upon the infant's father, or any person with whom she resided. To hand a citation to a child of tender years and *non sui juris*, and on that to found a jurisdiction, is never permissible. When this citation was first issued, the rule in equity and at law required service upon some one other than the child, and, standing as its protector, of sufficient discretion to understand and heed the mandate. (*Knickerbacker v. De Freest*, 2 Paige, 303; Code 1864, § 134.) And the rule of the surrogate's court was to follow the chancery practice. (*In re Whitehead*, 3 Dem. Sur. 227.) But that which was the well-understood and lawful method was, before the return day of this citation, explicitly commanded by statute. The act of 1874, c. 156, passed April 10, 1874, and taking effect immediately, enacted that minors were to be served, and citations issued, and special guardians appointed, in the same manner as required upon the probate of wills, and in no other way. What that way is appears by section 55 of the article relating to such probate, and requires not merely service upon the child, but also upon the parent or guardian; or, if there be none, upon the person with whom the infant resides. There is no proof of any such service. The unsworn memorandum appended to one of the papers, and signed "J. W. M.," is of course neither proof nor evidence. If somebody had told the surrogate the same thing in the street; it would be just as valuable to confer jurisdiction. No one knows who put it where it appears, or when it was made, or that the surrogate ever saw it; and its date was unfortunate for it was four days after the special guardian had

been appointed. It is quite enough, however, that it was not proof upon which the officer could act. But it is suggested that there was a sufficient service by publication. The three-months notice in the state paper affects only non-residents, and not a resident of the state who happens to be temporarily absent. On an accounting, it was provided by section 74 of the earlier statute that the citation should be served upon the parties living in the county of the surrogate personally, at least fifteen days before the return day ; upon those living out of that county, or whose residence was unknown, either personally or by publication, in a paper of the surrogate's county, and in a paper of such other county as most likely to reach the persons cited, as the surrogate should direct. He never directed ; there was no such additional publication, no inquiry by the officer, and no direction founded upon it. The provision referred to is that contained in the Revised Statutes, 2 Rev. St. p. 93, § 61. I have already said that a change was made in 1874, and controlled the surrogate's authority when the citation was returnable. That law authorized no publication except as to non-residents. Where, as in this case, the infant resided in the state, but outside of the surrogate's county, the service was required to be personal, or by leaving it at her dwelling house or other place of residence, with some person of suitable age. (3 Rev. St. [6th ed.] pp. 65, 66, § 55.) So, that under neither the old nor the new statute was there service of the citation in the manner required. We do not even know what was published. The record does not show. So far as it indicates anything, the affidavits seem to refer to the citation preceding them and which was issued February 19, 1874. But both publications began in October of the preceding year, and could not have covered a citation not yet issued, and we are able to see that the citation published, whatever it was, certainly was not the citation served on the infant the next year. If these difficulties could be surmounted, another remains.

The section of the Revised Statutes relating to publication on an accounting, and that of 1837, referring to pro-

bate of wills, were both amended in 1863 (Laws of 1863, c. 362, §§ 1, 5), so as to require, as essential to service by publication, that a copy of the notice as published shall be mailed to each of the persons served at least thirty days before the return day thereof. There is no pretense that this was done, and no atom of proof tending that way before the surrogate. It will not help to say that, although not mailed, a copy was delivered to the infant, for that delivered was a new and different citation, and was not a copy of the one published.

It is argued that, since there was some evidence of service before the surrogate, his conclusion thereon saves his jurisdiction. What there is of that rule has no application to the situation here disclosed. It is well settled that, when certain facts are to be proven to a court having only a special and limited jurisdiction as a basis for its action, a total defect of evidence as to any essential fact will make its action void, while some proof of every such fact may enable it to proceed. (*Miller v. Brinkerhoff*, 4 Denio, 119; *Staples v. Fairchild*, 3 N. Y. 41.) The cases cited on behalf of the appellants contemplate a record in which there is some evidence of every material fact essential to the jurisdiction. Here, as we have seen, it is totally wanting as to almost every essential fact.

It is quite apparent, therefore, that the decree of 1877 in no manner affected the plaintiff; that it cannot be used against her, or control her rights; and that there could not be, and in fact was not, any valid appointment of a special guardian to appear for her.

But, in view of these difficulties, another position is assumed. It is claimed that the infant, if never before, became bound by the decree when she formally applied to have it amended, and authority is cited to that effect. (*Johnson v. Johnson*, 67 How. Pr. 144, 146.) If we should concede that doctrine to be sound, it would not help the matter. Her application was made in March of 1887, but five years before that, and in February of 1882, upon the application of Charles Hall, and while the plaintiff was a minor, the

decree was amended by striking out the clause authorizing Mills to retain, as general guardian, the plaintiff's distributive share. Certainly, if her motion to amend bound her to the decree, it could only be to the decree as it then existed, and not at all to something which the court itself had stricken out five years earlier. It follows, therefore, that the decree of 1877, so far as defendant relies upon it, did not bind the plaintiff; does not conclude her in any respect; gives no help or aid to the defense of payment, and leaves the sureties to show, if they can, without its aid, that Mills was the lawful guardian of the infant, and that he did, by some act amounting to a payment, transfer the fund from himself as administrator to himself as guardian, so that the sureties upon his bond in the latter character became responsible for the money.

As we enter upon this inquiry (needless in one point of view, but prudent in another), the investigation shifts from the county of Westchester to the county of Oneida, and discloses in the office of its surrogate a very curious state of affairs. Since the infant and her father resided in that county, it was possible there to appoint for her a general guardian. The law authorized any relative or friend of an infant under fourteen years of age to apply to the surrogate for the appointment of a guardian, and that officer was required to appoint a day for the hearing thereof, and give such notice to the relatives of the minor as, after inquiry, he should direct. (3 Rev. St. [6th. Ed.] p. 168, §§ 5, 6.) The defendant produced a petition asking for such appointment. Where it came from we do not know. It was once in some form filed in the surrogate's office, under date of December 19, 1873, but that file mark is stricken out, and, as the evidence shows the erasure was the act of the surrogate himself. The original was produced for our examination, and its erasures and alterations are very imperfectly represented in the printed case. It is quite obvious that its original form, when filed, was that of a petition by John Hall, the father, for his own appointment as general guardian of the infant, sworn to November 21, 1873,

before James Ray, a justice of the peace, and filed in December following. It was never acted on. No day for hearing was appointed, and no appointment of a guardian made under it. On the contrary, it was taken from the files by the surrogate himself, the file marked stricken out, the words "prays that you will appoint your petitioner John Hall" altered by erasing "your petitioner" and "John Hall," and inserting "John W. Mills," and so making it a petition by John Hall, the father, for the appointment of Mills as general guardian. The original jurat was then stricken out, and Hall swore to the new and altered petition before the surrogate on February 16, 1874. The original consent, which read, "I, John Hall, hereby consent," was altered by erasing the word "Hall," and substituting "W. Mills;" so that it became the consent of John W. Mills which he signed. Of course the surrogate was not engaged in altering or mutilating his own records. He did not so regard the old petition, which had never been acted on, but was deemed an inchoate and abandoned application, which might honestly be altered to serve as a new one. The act itself, done by the surrogate himself, was either a criminal offense, amounting to a forgery of the record, or a conclusive proof that he and Hall and Mills perfectly understood and admitted that the original petition had never been acted on, and was but an inchoate and inoperative paper. We must assume that the changes were made by the surrogate at the date on which he administered the oath to Hall, and that Mills signed the consent at the same time; but we need not leave the matter upon that assumption merely, for it is inevitable that the change was made before the petition was presented to the officer, when it was so presented to him, or upon some day thereafter, and the result is the same in either case. If the alteration was made before December 19th, then on that day there was no petition which could be presented, and only a fraudulent paper not sworn to by anybody. If the change was made when presented, Hall was certainly not there, or, if present, refused to swear to or recognize the mutilated document,

and there was no sufficient petition or proof of anything. If the alteration took place afterwards, the written consent of Mills was then for the first time given, and did not exist on the 19th, in violation of the rule and practice which requires that the written consent of the person to be appointed shall be executed and filed with the petition and before the appointment is made. Of course, as I have said, the verifying of the altered petition by Hall was an admission by him and by the surrogate of the most conclusive character that no guardian had been appointed at the date of the verification. Its only honest object could be to lay the foundation for an appointment thereafter to be made, and it is inconceivable that the altered petition should have been prepared for any other purpose; and yet it was never filed in the surrogate's office. Where it went to, or what became of it, we do not know, except that it comes to light in the hands of the counsel for the defendant. Two months after it was sworn to, Mills began his final accounting in Westchester, and the decree which he procured, recites that on the 17th day of April, 1874, proof was made of the service of citations, and that the surrogate, "having ascertained" that the minors "then had no general guardian," did "thereupon" appoint Skinner special guardian. That appointment, as we have seen, was made two months earlier. Of course the information must have come from Mills, and he is bound by the recital which he either directly authorized, or knowingly permitted to be made. What the sureties understood is evident from the will of Lyon, which bears date October 31, 1885, in which he refers to his liability on the administrator's bond, and says of Agnes Hall that she "is not of age, and has no general guardian." So we have the surrogate of Oneida county, the surrogate of Westchester, John Hall, the father, Mills himself, and his surety, Lyon, all concurring that Agnes had no general guardian; and yet the singular fact is shown that prior to all these events, back of all these admissions, there were certain inchoate, unfinished, and imperfect proceedings preliminary to the appointment of a guardian, which indicate an exist-

ing intention to appoint Mills as guardian, and all of which occurred on the same 19th day of December, 1873, on which the petition of Hall, for his own appointment, was filed. These proceedings were two entries in the surrogate's book of minutes, one ordering that John W. Mills be appointed upon executing a prescribed bond, the other ordering simply that he be appointed; both of which entries are signed by the surrogate, and in the guardian's book an unsigned appointment of Mills, and unsigned letters of guardianship. There is also a bond of Mills and two sureties, approved by the surrogate on the same day. The unsigned appointment and the unsigned letters show on their face that they were incomplete and inoperative, because they terminate with the words "in testimony whereof the said surrogate has hereunto set his hand," showing that, until signed, they were incomplete and nugatory. There never was any such "testimony." They show another thing. On the trial the plaintiff's counsel seemed to think that the petition, as originally drawn, was for the appointment of both Hall and Mills, and almost induced the surrogate to say so. One only needs to scrutinize the consent appended to it to see that any such theory is impossible. It was drawn for one person to consent,—John Hall; it was altered for one person to consent,—John W. Mills. The recital in the prepared letters is that the petition prayed for the appointment of Mills, and he had consented. We know that the petition and consent never took that form until they were altered into it, the next year, by the surrogate himself. Both he and his clerk admit that he made the changes. There was thus no petition before the surrogate on December 19, 1873, for the appointment of Mills, and no written consent by Mills.

It is clear that the alterations made by the surrogate in 1874 are totally inconsistent with the theory that any petition for the appointment of Mills, or any written consent of Mills, was before him on December 19, 1873; and yet on that date, in his book of minutes, are the two orders indicating his intention to appoint Mills, not merely guardian

of Mary Agnes, but guardian of all three minors together, and that, on condition of his giving three separate bonds. Such is the form of the first order, and it is immediately followed by a second, in precisely the same form, except that there is no condition, and the reason for which neither the surrogate himself nor anybody else can explain. I have found it impossible to frame any probable theory which will account for and harmonize all these singular contradictions. It would seem as if Mills expected to be guardian of the infants; prepared his bond December 16th (although, again, the printer's probable mistake dates it in November;) so told the surrogate, who prepared all the orders accordingly, and withheld only his final and effective signature; that the petition furnished by Hall, and perhaps on that day produced by Mills, was filed without examination or observation, and, when its real form was discovered, Hall was, after some effort, induced to consent to a change which would better match what had been attempted, but no one dared to put the altered petition on the files of the court, and it passed into the hands of Mills, and so reached the sureties, who produced it. But that is merely a possible theory, and does not relieve us from the duty of determining whether the defendant has satisfied us that Mills was lawfully appointed general guardian of the plaintiff. The test is whether, on the facts disclosed, if the sureties on the alleged guardian's bond were sued, we could hold them liable. I think we could not. The sole ground would be the entries in the minutes, but such entries do not constitute the appointment, any more than an order for judgment in the minutes of the court constitutes the judgment. Such appointment results from several steps, and culminates and is finished in the delivery of the signed and sealed letters, after their record in the guardian's book, to the guardian. He gets no authority until they are signed and delivered, or at least are ready for delivery. Such is the practice, and the law contemplates both. The act of 1837, as it is incorporated in the sixth edition of the Revised Statutes 3 Rev. St. p. 171, §§ 35, 36, provides, first, that

the guardian shall render and file annual accounts, and then that the surrogate "shall annex to and deliver with each appointment of a general guardian" a copy of that requirement; and section 53 (page 334) provides that unsigned letters of guardianship may, in proper cases, to avoid all doubt, be signed by the surrogate's successor, with a view to their validity. Even that has not been done in the present case, and should not be done, under the existing facts. An order or direction in the minutes of the court that a person "be appointed guardian" is not an appointment made where such appointment is required to be made and certified and recorded in a particular manner, and it would introduce into the procedure of surrogates, in the delicate and important matter of guardianship, a degree of laxity which ought not to be permitted. I think it is a necessary conclusion of law from the facts disclosed that Mills never became the legally appointed guardian of the plaintiff.

Beyond that, it is entirely clear that, with the decree of 1877 out of the case, there is no evidence, and is not claimed to be any, which shows a transfer of the plaintiff's distributive share from the administrator, as such, to himself, in any other capacity. The sole ground for that contention was an alleged transmutation of that liability, resulting, as matter of law, from the operation of that decree. It is not needed that we consider that question, in view of our conclusion that the exception to the admission of the decree as binding on the plaintiff was well taken. The sureties are therefore left to the operation of the decree against their principal, rendered on the accounting of his successor; and charging such principal with both liability and loss, and without opportunity to appeal to a prior decree for a defense. What the effect might prove to be of the later adjudication against the successor of Mills in administration, as a construction by the same court of its own previous decree, and as denying utterly the force and effect claimed for that decree, we need not consider, in view of the conclusions which we have reached upon the question of jurisdiction.

On a review of the whole case, it seems to me that it would be a gross and inexcusable injustice to deny to this plaintiff a remedy for her wasted inheritance, against the sureties of the administrator. Such sureties must remain liable until they can show lawful payment to parties legally entitled to receive it; and where the sole defense is a merely technical and constructive transfer of liability from the same man in one capacity to himself in another, it is not too much to require that it should be fully and clearly established, so as to leave no doubt of the liability of the substituted sureties, and that we should not make remediless the waste and injury done by turning the plaintiff over to a hopeless litigation, resting upon unsigned and altered records, and contradicted by every party to the proceeding itself. The order of the General Term should be affirmed, with costs, and judgment absolute be rendered in favor of the plaintiff, upon the stipulation.

All concur.

DANIEL HAYS, Appellant; *vs.* FREDERICK ERNST *et al.*,
Appellees.

[32 Florida, 18.]

ATTESTATION—CONTESTED PROBATE—COMPETENCY OF WITNESS.

A will executed in the year 1885, attested by only two witnesses, though inoperative as to real estate, under McClel. Dig. Fla., page 985, section 1, requiring three witnesses to a devise of real estate, may be valid as to personality, the statute having no reference to wills of personality, except as to their revocation and to nuncupative wills.

The statutory prohibition (McClel. Dig. p. 987, § 9) against the admission of a will to probate on the oath of a person appointed executor thereof, when such person is interested in the estate bequeathed, or any part of it, applies only to the probate in common form, and does not render such person incompetent as a witness in a contest over the will.

Such person is also competent as a witness on an issue of *devisavit vel non* under Laws Fla. 1874, chapter 1983, section 1, providing that no person shall

be excluded from testifying by reason of his interest in the action or proceeding or because he is a party thereto except as to a transaction or communication between such witness and a party at the time of the examination, deceased, the execution of the will not being a transaction between the testator and the legatees or devisees.

APPEAL from Circuit Court, Duval county, by Daniel Hays from a decree refusing to admit to probate an instrument presented by him as the will of Johann C. Lehmann, deceased. A. W. Owens, in behalf of the State having filed a petition in contest.

M. C. Jordan and A. W. Cockrell & Son, for appellant.

J. R. Parrott, for appellees.

MABRY, J.—On the 9th day of October, A. D. 1885, Hays, the appellant, presented to the county judge of Duval county a writing purporting to be the last will and testament of Johann Christian Lehmann, accompanied with a petition setting up the fact that said writing was executed by Lehmann as his last will and testament, and praying that the same be probated as such. The writing claimed to be Lehmann's will and presented to the county judge, purports to devise to the proponent, Hays, real estate situated in Duval county, Florida, and in Franklin county, Ohio, and also all the bank account of Lehmann with the Florida Savings Bank and Real Estate Exchange, in the city of Jacksonville. This writing is signed by Johann Christian Lehmann and attested by John H. Brown and George W. Wetmore, and the attestation is that said "instrument was at the date thereof signed, sealed, and published and declared by the said Johann Christian Lehmann as and for his last will and testament, in presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses." Brown and Wetmore made oath before the county judge that Lehmann, on the 18th day of September, 1885, in their presence, subscribed said instrument as his last will and testament, and that affiants, at the request of Lehmann, and in

his presence, and in the presence of each other, subscribed their names as witnesses; also that, at the time of subscribing his name to said instrument, Lehmann was over twenty-one years old, and was of sound mind. Lehmann died on the 19th day of September, 1885, in the city of Jacksonville, where he had resided for some time before his death.

After the presentation of the alleged will to the county judge for probate, and without any action thereon by him, A. W. Owens presented a petition in the County Court of Duval county, addressed to the judge thereof, and therein alleged that Lehmann died in Duval county, Florida, on the 19th day of September, A. D. 1885, and, as petitioner was informed and believes, without leaving any heirs at law. The proceedings on the part of Hays in presenting to the county judge the instrument of writing as the will of Lehmann, with the request that it be probated, are set out in the petition; and, further, that, to the best of petitioner's knowledge, information, and belief, said Lehmann, at the time of the making of said instrument, was *non compos mentis*, and also that said instrument purporting to be his last will and testament was not signed by him, but by some one else, without his request or consent. It is also alleged that, if said instrument for any reason be invalid, the property of Lehmann, both real and personal, will escheat to the state of Florida, and that petitioner is the attorney and representative of the state in the county of Duval.

The prayer of the petition is that the court will inquire into the premises, as provided by law, and will declare said instrument null and void, and appoint an administrator to take charge of and administer the goods and chattels of said Lehmann, deceased.

This petition was presented on the 16th day of October, A. D. 1885, and on the 18th day of March, 1886, an order was made by the county judge, as it is recited by agreement of counsel, that the contest in the matter of the will of Johann Christian Lehmann be heard on a subsequent day in that month.

The record discloses the testimony of several witnesses

taken before the county judge in reference to the execution of the alleged will by Lehmann, and also the decision of said judge that the said instrument was not the last will and testament of said decedent, and should not be allowed to probate in said court. An appeal was taken from this decision to the Circuit Court of Duval county, and, upon argument there, the circuit judge decided that there was no error in the record of the County Court, and its judgment was affirmed. The record is now before us on appeal from the decision of the Circuit Court.

It is testified that four persons, Hays, the sole beneficiary in the will, Brown and Wetmore, the subscribing witnesses, and Clem Johnson, were present when it was executed, and that Lehmann asked Johnson to sign also as a witness, but he was told that two would do. The judge refers in his opinion to the fact that the will was signed by only two witnesses. At the time of the execution of the instrument in question, wills devising real estate were required by statute to be attested and subscribed by three or more witnesses, or else they were void and of no effect. (McClel. Dig. p. 895, § 1.) This means they were void and of no effect as devises of real estate. The statute did not undertake to prescribe the mode of executing wills in reference to the disposition of personal property, further than to regulate the revocation of such wills when written, and the establishment of non-cupative wills. In other respects the common-law rule controlled the execution of wills concerning personal property, and, according to this, such wills, when written, required no witness to their execution. (*Meyer v. Fogg*, 7 Fla. 292; *Schouler Wills*, § 318.) The instrument offered for probate in the case before us purports to devise both real and personal property, and, so far as being a will of the realty, it must fail in this jurisdiction, because it has only two attesting and subscribing witnesses. (*Croll v. Clark*, 20 Fla. 849.) The county judge would for this reason have been justified in refusing to probate the instrument as a bequest of real estate, but the absence of subscribing witnesses would not be enough to sustain its

rejection as a will of the personalty, provided it had the requisites of a valid will for this purpose in other respects. While the county judge refers in the opinion rendered by him to the fact that the alleged will has but two subscribing witnesses, it is clear that he based his decision rejecting the proposed will *in toto* also upon testimony before him, and regarded as competent. The decision, in effect, on the testimony, was that Lehmann did not execute the instrument offered as his will, and hence it was not entitled to be probated for any purpose. The proponent (appellant here) insists that the county judge committed an error in his ruling on the testimony, and that the judgment should be reversed on this account. This will necessitate a brief reference to the testimony and the rulings of the court thereon.

Hays, Brown, Wetmore, and Johnson testified for proponent that they were present when the instrument was executed, and saw Lehmann sign the same as his will in their presence, and that Brown and Wetmore, at his request, in his presence, and in the presence of each other, signed it as witnesses. Hays is named as executor of the will, and is sole beneficiary therein. At the time of Lehmann's death he was occupying a room in Hays' house, and died there. Hays says he let Lehmann have a room after he had failed to get one anywhere else, and he expressed great appreciation for this kindness, and said that he had been sick for many years. While staying in Hays' house, Lehmann bought real estate in Jacksonville, and consulted Hays about the purchase, and seemed to place great confidence in him. Hays testified to attentions shown by him to Lehmann during his last illness, and about his wanting to make a will, and asking Hays to get some one to write it for him. He then testified to the writing of the will and its execution as above stated, and also of Lehmann's death, the day following. Two other witnesses testified for proponent that they were familiar with Lehmann's handwriting, and gave it as their opinion that his name signed to the alleged will was genuine. In opposition to this show-

ing for the proponent, *caveator* introduced four witnesses two of whom, as experts, in comparing the signature to the alleged will and the signature to a note and mortgage introduced in evidence, and shown to have been signed by Lehmann, say that, in their opinion, the signatures were not made by the same person, and that the signature to the will was not genuine. Two other witnesses, who were familiar with Lehmann's handwriting, and who were employes in banks where he did his business, say that they would not have paid checks for Lehmann with the same signature on them that is on the will. The will and also the signature of Lehmann, shown to be genuine, signed to a note and mortgage, were before the county judge when he made his decision. In considering the case, the county judge ruled out and refused to consider the testimony of Hays, on the ground that he was an interested party. Was this ruling correct on the issue then before the county judge? The statute provides that "no will shall be admitted to probate upon the oath of any person appointed executor or executrix thereto, when it shall appear by said will or otherwise that said person so appointed is interested in the estate therein bequeathed, or any part thereof." (McClel. Dig. p. 987, § 9.) This statute was passed as an amendment to the one passed the year before, authorizing wills to be admitted to probate upon the oath of any person appointed executor or executrix thereto. (Id. p. 986.) These provisions had reference to the admission of wills to probate in common form, and without reference to testimony over the contests of wills. They provided that wills might be admitted to probate upon the oath of the executor or executrix when not interested in the estate devised, or, where there was no executor or executrix, upon the oath of any credible person having no interest under the will, that he or she verily believed the writing exhibited as the last will and testament to be the true last will and testament of the deceased. When a will, with all the essential requisities as to its execution, and apparently genuine, is exhibited to the county judge for probate, he would be

authorized, under the provisions of the statute and on the oath of the party mentioned, to admit it to probate. The oath of the disinterested executor or other credible person is the formal proof required by the statute to admit the will to probate in such cases, but it has no reference to the competency of persons to testify to material matters on a contest of the will. Section 1, c. 1983, Laws of 1874, provides that "no person offered as a witness in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto;" and the proviso to this section, excluding certain interested persons from testifying in regard to any transaction or communication between such persons and a party at the time of examination deceased, does not, in our judgment, exclude Hays from testifying as a witness to the probate of the will which was the subject-matter of consideration before the court. A proceeding to establish or invalidate a will rests upon different grounds from ordinary causes of action, and are in the nature of proceedings *in rem*. The heirs-at-law and next of kin and devisees are usually nominal parties, but the proceeding is between living parties. The cause of action does not exist until after the death of the testator, and he is in no sense then a party of the proceeding. On a contest of a will, the subject-matter of investigation is the act of the testator in executing the will, and the proceeding is directed to this matter. The execution of a will is not a transaction or communication between the testator and a legatee, and the heirs-at-law, next of kin, and devisees are competent witnesses as to the factum of the execution of the will. (*Garvin's Adm'r v. Williams*, 50 Mo. 206; *Shailer v. Bumstead*, 99 Mass. 112; *Lawyer v. Smith*, 8 Mich. 411; *Snider v. Burks*, 84 Ala. 53; 4 South. Rep. 225; *Kumpe v. Coons*, 63 Ala. 448; *Milton v. Hunter*, 13 Bush, 163.) The county judge committed an error, then, in excluding from his consideration the testimony of Hays on the ground of interest. What would have been the result had Hays' testimony been cast into the judicial scale we cannot say. The decision was

against the validity of the will, and, as it cannot be said that there was no conflict of evidence on this point, the exclusion of competent evidence was error. (*Simmons v. Spratt*, 26 Fla. 449; 8 South. Rep. 123; *Dickey v. Malechi*, 6 Mo. 177.)

So far we have considered the case, as it seems by the record to have been presented in the County Court, as a contest of the proposed will on the *caveat* filed by the state attorney, alleging a failure of heirs on the part of Lehmann, the alleged testator. In the opinion rendered by the county judge, rejecting the will for probate, it is stated: "It is a well-established principle of law that no one but an heir of the realty, or entitled to distribution, has a right to contest the probate of a will or a devise of the realty; and it is contended by counsel for petitioner that A. W. Owens, Esq., representing the state of Florida, has no right to appear in opposition to the application for probate of the alleged will; but there is evidence before this court that said Lehmann left heirs surviving him, and A. W. Owens is now recognized by the court as counsel and proctor for and in behalf of the heirs and legal representatives of said Lehmann." In the bond filed by the appellant in the appeal from the County Court to the Circuit Court, Frederick Ernst and several others are named as obligees, and it is therein recited that they contested the probate of said will; and in the bond filed on appeal to this court the same parties are mentioned as obligees, and it is also recited that they were contestants of said will. There is nothing in the record, except what is recited in the opinion of the county judge above and the recitals in the appeal bonds, to show that Lehmann left any heirs, or that any contest of the will was made in their behalf in the County Court. Upon the filing of the *caveat* on the part of the state attorney, the record recites that, upon agreement of counsel, the contest of the will of Lehmann was fixed for hearing on a certain day. The testimony was taken, and, in rendering judgment thereon, reference is made for the first time to the heirs, and their representation by the *caveator*, who had

commenced the contest by filing the petition against the probate of the will.

It is said in *Meyer v. Fogg* (7 Fla. 292), that the only persons competent to contest the will then under consideration were the heirs of the realty or distributees entitled to the personalty, and there should be allegation and proof of such fact. The contestants of the will in that case, failing to show such a status, were not entitled to a standing in court. The testator left heirs in that case. The county judge had jurisdiction of the contest over the probate of wills, and the only statutory regulation as to the practice before him in such matters at the time of the decision in the case before us is that in chapter 1627, Acts 1868. (*Lavey v. Doig*, 25 Fla. 611; 6 South. Rep. 259.) Chapter 3886, Acts 1889, makes special provision for the contests of the probate of wills, and this act is declared to be applicable to wills of persons who had died prior to its passage, and which had not been admitted to probate, as well as to wills of persons who should die after its passage; but the decision in this case was made before this act went into effect.

The act of 1868, *supra*, provides that the pleadings in the County Court, sitting as a Court of Probate, shall be in writing, and shall be (1) the complaint by petition, and (2) the answer or demurrer; and that, upon filing the answer, the cause shall be at issue. Considering an issue by agreement of parties to have been made upon the petition of Hays to have the will probated and the *caveat* of the state attorney, the case presented in the County Court was between them, and, confined strictly to the record, there is nothing to show that the heirs of Lehmann, if he left any, were before the court as contestants of the will. One of the assignments of error in the Circuit Court (and the same is renewed here) was that the alleged heirs of Lehmann were not parties to said cause by any appropriate or legal proceeding, and were not, in fact, contestants of said will. As we have above stated, the issue strictly presented on the record in the County Court was on the *caveat* filed by the state attorney, on the theory that there were no heirs of Leh-

mann; and, considering it from this standpoint, the county judge committed an error in excluding the testimony of the proponent, Hays, if for no other reason. The same result would follow if we were to recognize A. W. Owens as representing the heirs of Lehmann. Inasmuch as the case must be reversed, it is deemed proper to direct that, upon the return of the mandate of this court, an issue be properly made on the petition of the heirs of Lehmann, if he left any, and they desire to contest the said will, and that due proceedings be had thereon as provided by law.

EVANS' ESTATE. EVANS' APPEAL.

[155 Pennsylvania State, 646.]

REMAINDER TO HEIRS-AT-LAW—VESTED OR CONTINGENT—COSTS ON DISTRIBUTION.

Under a bequest in trust to pay to a nephew the interest and so much of the principal as may be necessary for his support, and on his death, to pay the remainder, if any, to heirs-at-law, with a provision that the legacy should not be subject to his debts or contracts, the remainder vests in his children living at the testator's death, subject to open and let in afterborn children. The costs of an audit rendered necessary on the distribution of an estate, by reason of attachments and assignments of distributive shares are properly charged against the shares attached and assigned.

APPEAL from Orphans' Court, Lancaster county, in proceeding to distribute a balance in the hands of Charles H. Locher, trustee, appointed by the court under the will of James Evans, deceased, the ninth clause of which was as follows: "I give and bequeath to my nephew, Robert A. Evans, the sum of five thousand dollars, in trust, for the use and benefit of my nephew William W. Evans, for whom I hereby appoint the said Robert A. trustee, as follows: That is to say, the said Robert A. Evans shall invest the said sum of money at interest on mortgage or good security,

and shall pay out from time to time the interest as it shall be got in and received, and also such part of the principal, to the said William W. Evans, during his natural life, as the said Robert shall deem necessary for the comfortable support and maintenance of the said William W. Evans, whose receipts alone shall be good and valid discharges to the said trustee. And after the decease of the said William W. Evans the said trustee shall pay over the balance remaining, if any, to the heirs-at-law of the said William. The said legacy is not to be subject to the debts or contracts of the said William W. Evans." William W. Evans died in September, 1891, leaving seven children, three of whom were born after the death of the testator. On November 21, 1891, Charles H. Locher, trustee, filed his account in the register's office, which account was confirmed by the court and an auditor appointed to distribute who reported in part as follows :

A large number of suits by attachments were brought against several of the heirs of William W. Evans, deceased. Before proceeding, however, to pass upon the merits of these proceedings, it will be necessary to construe the clause of the will from which the fund for distribution arises.

"The counsel for Milton Eby, an attachment execution creditor of James Evans, a son of William W. Evans, deceased, the *cestui que trust*, contends that William W. Evans had, under clause nine of the will of the uncle, James Evans, deceased, a life estate, with a vested remainder in his children as a class ; and therefore James Evans, the grandnephew of the testator, and who was living at the death of the testator, took a vested interest at testator's death.

"The principal words of the clause of the will under consideration are : 'And after the decease of the said William W. Evans, the said trustee shall pay over the balance remaining (if any) to the heirs-at-law of the said William.'

"The fund to be distributed is personal estate. The rules and expressions relative to the vesting of the personal

estate have been derived in great measure from the civil law. In that system, legacies not immediately payable are divided into two classes: (1) Legacies payable at a future time, certain to arrive, (as to which, *dies legati* was said *cessisse*, though not *venisse*;) and (2) conditional legacies, or legacies payable on an event which might never happen. The former class were transmissible to the representatives of the legatee, if he died before the time of payment; the latter were not. (Hawk. Wills, *222.)

"This division, however, is applicable to the English law of legacies, which allows future conditional interests to be transmitted to the representatives of the legatee, and which considers some kinds of conditional gifts as 'vested subject to be divested,' *i. e.*, subject to a condition subsequent and not precedent. *Id.*

"The only definition that can be given of the word 'vested' in English law, has applied to future interests other than remainders, is that it means 'not subject to a condition precedent.' What amounts to a condition precedent, the cases only can determine. *Id.*

"In New Jersey it is held that, whether a legacy is contingent or vested depends not upon the time, but upon the event upon which it is to take effect. If the event is uncertain, the legacy is contingent, though the time is fixed; and, if certain, it is vested, although the time is uncertain. A gift at the death of A. is vested, not, it would seem for the reason given by the English authorities, but because the event is certain to happen. (*Thomas v. Anderson*, 21 N. J. Eq. 22; *Beatty v. Montgomery*, *id.* 324.)

"The inclination is to confine the uncertain events which will make a legacy contingent to those which are personal to the legatee. (*Van Dyke v. Vanderpool*, 14 N. J. Eq. 206.)

"A similar doctrine is laid down in *Tayloe v. Mosher*, 29 Md. 443. In this latter case the court say: 'To make an estate contingent it must appear from the language used and the nature and circumstances of the case that the time of payment was made the substance of the gift, and that the testator meant that time as the period of vesting.'

"The general doctrine in this country is that a postponement will not of itself create a contingency, unless it be upon an event of such nature that it is to be presumed the testator intended to make no gift unless the event happened, or, as it is sometimes put, unless the time be annexed to the substance of the gift. (*Van Wyck v. Bloodgood*, 1 Bradf. Sur, 154.) In Pennsylvania the same doctrine prevails. (*Chew's Appeal*, 37 Pa. St. 29; *Muhlenberg's Appeal*, 103 Pa. St. 591.)

"The rule of interpretation is: Rule. A bequest in the form of a direction to pay and divide at a future period vests immediately, if the payment be postponed for the convenience of the estate, or to let in some other interest. (*Hawk. Wills*, *232; *McGill's Appeal*, 61 Pa. St. 49, and authorities therein considered and approved.)

"Thus, under a bequest to trustees in trust for A, during his life, and after his death to pay and divide among his children, the shares of children living in the lifetime of A. are vested, and pass to their representatives. (*Hawk. Wills, supra*).

"In doubtful cases the law requires the construction to be made in favor of vested remainders, in preference to contingent, and indefeasible estates in preference to defeasible. (*Womrath v. McCormack*, 51 Pa. St. 504.)

"Assuming, then, that if, under the will as it was in fact drawn, William W. Evans took an estate for life, the question is whether the estate over was vested in his children at testator's death, or was contingent during his lifetime, and at his death vested in those who were then his 'heirs-at-law' or legal heirs. The counsel *contra* contends that the latter construction is the correct one. This leads us to the question of the intent of the testator as to the form of the concluding part of the bequest; that is, the words 'heirs-at-law' of the said William.

"In this country the meaning of the term 'heirs' depends upon the nature of the property; and whether the gift be substitutional or original, a bequest of personalty to the heirs of A. is a gift to those who would be entitled to

the personal estate of A. under the statutes of distributions. (Hawk. Wills, *91, note 1; *Eby's Appeal*, 84 Pa. St. 241; *Appeal of Comly*, 136 Pa. St. 159; 20 Atl. Rep. 397; *Reck's Appeal*, 78 Pa. St. 435; *Ashton's Estate*, 134 Pa. St. 395; 19 Atl. Rep. 699.)

"In the latter case cited the words of the will were: 'Then in trust to and for the use of the right heirs of him, the said Charles T. Ashton, in equal shares'; and the Supreme Court, in construing this clause to mean those entitled under the statute of distributions, says: 'The two nephews of Charles T. Ashton take, not by representation, but directly under their grandfather's will as next of kin of their deceased uncle. (See, also, *Eldridge v. Eldridge*, (N. J. Ch.) 3 Atl. Rep. 61.)

"In the case of *Reck's Appeal*, *supra*, the testator in the will before the court said that his widow should receive during her life the interest of one thousand dollars, to be put at interest by his executors, 'and, should the interest of the same be insufficient to provide for her, then as much of the principal as may be required.'

"The counsel, in opposition to the view taken by counsel for Milton Eby, attachment execution creditor of James Evans, contends that the interest of the children of William W. Evans is but a contingent legacy, and relies on the case of *Pleasanton's Appeal* (99 Pa. St. 369); but a glance at the case shows clearly the intention of the testator there was to take the case out of the general rule.

"In bequests of personalty no legal significance attaches to the word 'heirs.' (*Ashton's Estate*, *supra*.) There is nothing in the context of the will before us to indicate a contrary intention to take the present case out of the rule that when the word 'heirs,' is used in a gift of personalty it is employed to denote those who are entitled to take under the statute of distributions. The heirs here, under the rule, are evidently the children of William W. Evans, deceased, the *cestui que trust*; and as such, these children take not by representation, but directly under their grand-uncle's will.

"The most of these children were *in esse* at the time of the testator's death. Robert A., William G., and William W. were born since. 'But it is now settled that, where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or of any other person, the limitation will embrace not only the objects living at the death of the testator, but all who shall subsequently come into existence before the period of distribution. Such a remainder vests in objects to whom the description applies at the death of the testator, subject to open and let in others answering the description as they are born successively. As to the latter, the remainder is contingent until they are *in esse*, but then it immediately vests, and from thenceforth is attended by all the properties incidental to vested estates.' (*Minnig v. Batdorff*, 5 Pa. St. 505; *Bower's Estate*, 11 Phila. 620.)

"The intent of the testator was without doubt to give all the children of William W. Evans a vested legacy. The life estate or legacy to the father was evidently a spendthrift trust, and purposely made an active trust to save as much of the principal of the fund set apart as possible for these children, as well as to provide for a liberal maintenance and support of the *cestui que trust*. Indeed, the clause of the will under consideration says that 'the said legacy is not to be subject to the debts or contracts of the said William W. Evans.' It follows that the whole estate is in the children of the *cestui que trust* in equal shares. * * *

"One question more has been referred to your auditor, and yet remains to be considered. The counsel for Gertrude K. Cox, legatee, asks that the costs of this audit be imposed upon those distributive shares the assignments or attachments of which have rendered an audit necessary.

The auditor's first impression was to tax the whole fund for distribution with the costs of audit, in accordance with our practice. It seems to him that a departure from this feature of our practice might establish a precedent which our courts would be loath to adopt. The case before us, however, is an unusual one and a careful consideration of

the matter has induced the auditor to change his view by granting the request. The transferees and attachees of the several interests can file exception thereto, and thus appeal to the court from the judgment of your auditor, should they deem it just and proper.

It is true that the counsel for Mrs. Cox objected to the appointment of an auditor, so far as her share was concerned, as appears by a minute of the same on the back of the account at the time the court made the appointment to distribute the balance in the hands of the accountant; but your auditor does not understand that the appointing judge intended, in so doing, to pass upon the question now before us, to even affect the same. Indeed, it was proper for counsel to take this preliminary step in behalf of his client, for a neglect to do so would have undoubtedly have been taken as a consent to the appointment to her prejudice.

"It is not so much the amount of money involved as the apparent unfairness of the proceedings should a part of the costs of audit be imposed upon the distributive shares not in dispute. Had not the other shares have been in dispute an audit would have been unnecessary. Under the circumstances, to impose a tax upon the former would certainly not be equitable. On the other hand, 'the dancer should pay for the fiddler.' It will not be much, if any burden upon the scrambling creditors whose vigilance has been rewarded by payment of their respective claims in full. The costs of audit are deducted from the shares indispute."

B. F. Davis, for appellant.

A. J. Eberly, for the appellee trustee.

N. F. Hall and Brown & Hensel, for other appellees.

PER CURIAM.—The subjects of complaint in this case are the refusals of the court to sustain the several exceptions to the auditor's report, recited in the six specifications of error, respectively. An examination of the record discloses

nothing that requires either a reversal or modification of the decree. We quite agree with the learned president of the Orphans' Court in saying: "We have failed to find anything to convince us that the learned auditor has erred with reference to the matters complained of by the exceptant, either as to the distribution or disposition of the costs." The facts are clearly stated by the auditor, and the questions arising thereon are so satisfactorily disposed of by him that we affirm the decree on his report.

Decree affirmed, and appeal dismissed, at appellant's costs.

KELLY vs. RICHARDSON, Executor.

[100 Alabama, 584.]

CODICIL — CONSTRUCTION — DEED AS CODICIL — LEGACIES AND DEVISES — GENERAL AND SPECIFIC — ABATEMENT — CONTRACTS OF LEGATEES — DUTY OF EXECUTOR.

- A** codicil commencing "Additional to page 1, from second clause. Second. After paying all my just debts" and containing no other clause, is to be construed as a revocation of and substitute for the second clause of the will, which begins in the same manner, both the original clause and the codicil purporting to bequeath all the personal property of the testator.
- An** instrument executed by testator after making his will, purporting to convey certain real estate in consideration of kind services rendered by the grantee and a nominal sum, reserving to himself the use of the property and the possession of the instrument during his life "then this conveyance to be delivered to" the grantee, may, if executed as required by the statute, operate as a codicil to the will.
- A** bequest of all of testator's property with certain specified exceptions is a general legacy, as are also bequests of specific sums of money not directed to be paid out of any particular fund.
- A** bequest of a stock of merchandise, books, accounts, notes, store fixtures and everything belonging in a certain store is a specific legacy.
- All** devises, whether by specific description or by residuary clauses, are specific, except in so far as they may include after acquired real estate as to which the devise is general unless it is so described as to admit of its identification.

A bequest of a mercantile business is not relieved of liability for the general indebtedness of the estate by a provision that the legatee shall assume all the liabilities of the business, but stands on the same footing with other specific legacies as to such general indebtedness.

If the property included in such bequest is not sufficient to pay the liabilities of the business the balance is to be paid in the same manner as the other indebtedness of the estate.

General devises contribute ratably with general legacies to debts of the estate and the expenses of administration and after these are exhausted specific legacies and devises abate pro-rata, if necessary to make up any deficiency.

Testator having bequeathed to one person all of his personal property excepting stock of merchandise, books, accounts, notes, store fixtures and everything belonging in a specified store which he gave to another person, and not having charged the pecuniary legacies on the realty, neither the general bequest first mentioned, nor the specified legacy of the excepted property will be held to include money in bank or in the store.

Under an agreement by which one legatee purchases the interest of another and agrees that the executor shall hold his interest in the estate in pledge for the latter, until he has paid the purchase and shall not pay or surrender to him any part of the estate till it is paid, the executor may out of any money in his hands going to the purchaser pay that sum, but has no authority for that purpose to convert into money property specifically devised or bequeathed.

A sale of the interest of one as legatee and devisee will not embrace land described in an instrument supposed to be a deed from the testator to the devisee, but which can operate only as a codicil to the will.

APPEAL from Chancery Court, Butler county,

The bill in this case was filed by J. C. Richardson, as the executor of J. T. Perry, deceased, against the persons to whom the said J. T. Perry, by his last will, bequeathed his personal property and devised his realty, and prayed that the administration of said estate be removed into the Chancery Court, that the will be construed, and that the executor be directed as to his administration of the said last will and testament.

Stallings & Wilkinson, for appellants.

J. C. Richardson, for appellees.

MCCLELLAN, J.—J. C. Richardson, as executor of the last will and testament of J. T. Perry, deceased, filed his

bill in the Chancery Court of Butler county against Sarah E. Kelly, J. M. Carroll, and others, the devisees and legatees thereunder, praying that the administration of the decedent's estate be removed from the Probate into the Chancery Court, and there managed, administered, and settled; that the will of the deceased be interpreted and construed by the Chancery Court, and that rights, interests, and duties of the executor, devisees, and legatees thereunder be declared; that the duties and liabilities of the executor in respect of a certain contract made by and between said Carroll and said Kelly be determined; that a certain "pretended deed" signed by the testator shortly before his death, and found in the hands of Carroll, purporting to convey a lot or parcel of land to said Kelly, be annulled and canceled, or held to be a part of said will, etc. The bill also contains the general prayer for relief. There is some suggestion in the bill, made by a reference to the averments of another bill, in a different case, where the charge was directly advanced, that Carroll had wrongfully and fraudulently gotten possession of a large sum of money which Perry had at the time of his death, and upon this suggestion the present bill sought a recovery from Carroll of this alleged fund. Evidence was adduced in that connection, but no decree was entered on this part of the case, and no question connected with it is now presented for our consideration. The fact that some question is raised as to the validity of a codicil to the will is also stated in the bill, and the Chancery Court is asked to determine whether the codicil is valid or not, but this inquiry is not pursued beyond this suggestion and prayer. The will and codicil were duly probated and established in the Probate Court. No decree on the validity of either was passed by the Chancery Court, but that court treated and considered the will and codicil together as constituting the last testament of the deceased, and so we will consider them.

No objection is here urged to the decree of the chancellor, in so far as it removed the administration of the estate from the Probate into the Chancery Court. The propriety

of and the necessity for that action appear to have been conceded by all parties on the hearing.

The questions of chief importance raised by this record bear upon the construction of the testator's will and codicil, and, that these may be the more clearly presented, those instruments, omitting their formal parts, are here copied, as follows:

“First. My will is that all my just debts and funeral expenses, including a monument over my grave, be paid out of my estate as soon after my death as convenient. Second. After paying all my just debts and funeral expenses, as heretofore described, I give, devise, and bequeath to my beloved sister Mahala I. Rothenhofer all my personal property except my piano, which I give, devise, and bequeath to my niece Henrietta Dohrmeier, and my parlor set of furniture, including carpet and parlor pictures of every kind, that is in my parlors, to my niece Bessie Dohrmeier. Third. I give, devise, and bequeath five hundred dollars in cash to each of my sisters Mahala I. Rothenhofer, Martha I. Fulmore, and my sister-in-law Georgiana V. Carroll, which shall be paid over to them by my executors within twelve months after my death, or sooner, if practicable. Real estate:

I give, devise, and bequeath to my nephew J. M. Carroll my two brick stores and lots on the corner of Commerce and Bolling streets, each fronting twenty-five feet on Commerce street, and running back 125 feet; but if he should die without issue, before the reversion or remainder shall come into his possession, then I give, devise, and bequeath the same to my niece Fannie Bell Dohrmeier, her heirs and assigns, forever. Fourth. I give, devise, and bequeath to my niece Fannie Bell Dohrmeier my hotel and lot known as the ‘Perry House,’ on the north side of Commerce street, fronting about fifty feet on Commerce street, and running back 100 feet. Also, I give, devise, and bequeath to my niece Fannie Bell Dohrmeier my two one-story brick stores and lots west and adjoining the “Perry Hotel” and the L. and N. R. R. right of way. Fifth. I give, devise, and be-

queath to my neice Henrietta Dohrmeier my two brick storehouses and lots on the south side of Commerce street, described as follows, i e., the third and fourth stores from the corner of Commerce and Bolling streets, and immediately east and adjoining the two stores that I have given to J. M. Carroll, fronting twenty feet on Commerce street, and running back 125 feet each, one now occupied by Prof. J. P. Steele, and the other by H. Potter. Sixth. I give, devise, and bequeath to my niece, Bessie Dohrmeier, my two two-story brick stores on the south side of Commerce street, known as the 'Sol Erick Dry Goods Store' and 'Lichten & Co. Drug Store,' each fronting twenty feet, on Commerce street, and running back 100 feet, immediately east and adjoining the two stores that I have given to Henrietta Dohrmeier, they being the fifth and sixth stores from the corner of Commerce and Bolling streets. Seventh. I give, devise, and bequeath to my niece Eva Dohrmeier, my two one-story brick store-houses and lots on the north side of Commerce street, fronting about forty-five feet on Commerce street, and running back 100 feet, immediately east and adjoining the hotel known as the 'Perry House,' and now occupied by J. C. Bryan as a billiard and drinking saloon. Eighth. I give, devise, and bequeath to my nephew Herman Perry Dohrmeier all other property which I may died seised and possessed of, or that I may be entitled to at the time of my death. And I hereby appoint my nephew J. M. Carroll, Edward Crenshaw, and J. C. Richardson to be the executors of this, my last will and testament; and I hereby authorize them, or the survivors of them, to do all things necessary to carry out the terms of this will, and to avoid, if possible, the necessity of going into any of the courts to settle up this will. It is my wish, too, in case of disagreement between any of the parties to this will, that the same shall be settled by arbitration, instead of going into Chancery or any other court with it. The said executors, or such of them as act, shall give bond and security in the sum of ten thousand dollars for the faithful performance in carrying out the terms and

provisions of this will; said bond to be taken and approved by the probate judge of this county. To all of which I set my hand and seal this the 10th day of February, 1887."

The codicil: "Codicil. Additional to page 1, from second clause. Second. After paying all my just debts and funeral expenses, as heretofore described, I give, devise, and bequeath to my beloved sister, Mahala J. Rothenhofer, all my personal property, excepting stock of merchandise, books, accounts, notes, store fixtures, and everything belonging in said store now occupied by me on corner of Commerce and Bolling streets, to my nephew J. M. Carroll, who will assume all the liabilities of the store, and continue the business as heretofore, and he would (will?) provide for the welfare of my beloved sister Elizabeth Kelly, and my sister-in-law Georgiana V. Carroll, as long as they live and will accept."

It is clear, we think, that this codicil was intended, not as an addendum, merely, to the second clause of the will, but as a revocation and expurgation of that clause, in its entirety, and the substitution of the new provisions in lieu of it. The codicil is stated to be "additional," not to clause second, but "to page 1, from (or commencing with) second clause." With this identification of the point in the original paper where the codicil is to be inserted in the reading of both as one instrument, the body of the addition to page 1 is denominated "Second." There being only one clause in the codicil, this word could have been used only for the purpose of referring it to its proper place, as clause second in the original will; and this idea finds further support in the fact that the language of the codicil, down to the exception stated therein, is precisely that of the original clause down to the exception. The original clause, in other words, bequeathed all of the testator's personalty to Mrs. Rothenhofer, with certain exceptions in specie to Henrietta and Bessie Dohrmeier, respectively. The codicil, in identical terms, bequeathed all of the personalty to Mrs. Rothenhofer, with certain specific and entirely different exceptions to J. M. Carroll. Each of the provisions, in terms, covers

all of the testator's personal estate, and disposes of it. It may well be that the testator, having determined upon the provision for Carroll, and seeing that thereby the value of his bequest to Mrs. Rothenhofer would be greatly lessened, had in mind to maintain the quantum of her legacy to the extent that could be done by striking out the exception originally embraced in the clause "second," and revoking the legacies thereunder given to the Dohrmeiers. Certain it is that these clauses cover the same field, and to the same extent the personalty, and all the personalty of the estate. Certain it is, also, that they are wholly inconsistent with each other as respects their several exceptions from the general bequests of all personalty, and their specific legacies out of and embracing in each instance all of the property excepted from the general bequest to Mrs. Rothenhofer; and of course the codicil must be upheld, the effect being a revocation of the specific legacies to Henrietta and Bessie Dohrmeier. The chancellor erred in his decree upon this matter.

There is another instrument brought to light in this case, which in our opinion must, if and when probated, as it may be, operate as a codicil to the will of J. T. Perry. We refer to the paper executed by the testator on June 21, 1887, which is in the following language:

"State of Alabama, Butler county. Know all men by these presents, that I, John T. Perry, of the county and state aforesaid, for and in consideration of kind and valuable services rendered to me by Elizabeth Kelly, of the county and state aforesaid, and also for the further consideration of \$5.00 to me in hand paid, the receipt of which is hereby acknowledged, have given, granted, bargained, and sold, and by these presents do give, grant, bargain, sell, and convey, unto the said Elizabeth Kelly, the following described lot or parcel of land, viz.: One house and lot known as the 'Conley Place,' bounded on north by Commerce street, on south by Geo. W. Bryan's lot, on the east by an alley, on the west by Mrs. Rothenhofer's lot—containing one-half acre, more or less, situated in the city of

Greenville, county and state aforesaid, together with all and singular, the hereditaments and appurtenances thereunto belonging, to have and to hold the aforegranted premises unto the said Elizabeth Kelly, her heirs and assigns, as against myself, my heirs and assigns, and against all persons claiming or to claim the same by or through me in any manner whatever, but reserving unto myself the use, occupation, and enjoyment and control of the same for and during the term of my natural life, and I am to retain the possession of this conveyance during the term of my natural life; then this conveyance to be delivered to the said Elizabeth Kelly. In witness whereof, I hereunto set my hand and seal this twenty-first day of June, 1887. J. T. Perry. [Seal.] In presence: S. J. Bolling, J. M. Carroll." It is most clear that this instrument is inoperative as a deed. It conveyed no estate in possession or in title during the life of Perry. He was not only to retain "the use, occupation, enjoyment, and control" of the land for the term of his natural life, but by the express terms of the paper there was to and could be no delivery of the instrument, in escrow or otherwise, until after his death, and in legal contemplation posthumous delivery is no delivery at all. (*Richardson v. Iron Co.*, 90 Ala. 266; 8 South. Rep. 7.) On this state of case the instrument is void as a deed, but if, as seems probable, it was executed with the formalities requisite to a will, it may, when proved as a codicil to the will, operate as a testamentary disposition of the house and lot described in it to Mrs. Kelly. (*Crocker v. Smith*, 94 Ala. 295; 10 South. Rep. 358; *Trawick v. Davis*, 85 Ala. 342; 5 South. Rep. 83; *Kyle v. Perdue*, 87 Ala. 423; 6 South. Rep. 296.)

Putting the codicil first considered in the stead of the second clause of the will, and adding to the will this paper of June 21, 1887, as a codicil thereto — which we will assume, for the purpose of this opinion, has been probated as such — it is now to be considered what is the character of its several bequests and devises, in respect of the first being specific, demonstrative, or general, and of the second (de-

vise) being specific or general, with a view to determining in what order they shall be abated or adeemed through contribution to the payment of the debts of the estate, and the expenses of its administration. The principles of law in this connection are plain and familiar, for the most part, and, in the main, of easy application to this case. "A specific legacy is a bequest of a particular article or specific part of the testator's estate, which is so described and distinguished from all other articles or parts of the same as to be capable of being identified." "A demonstrative legacy is a bequest of money or other fungible goods, charged upon a particular fund in such way as not to amount to a gift of the corpus of the fund, or to evince an intention to relieve the general estate from liability in case the fund fail, and so described as to be undistinguishable from other things of the same kind." "A general legacy is a bequest chargeable upon the general estate, and not so given as to be distinguishable from other parts of the estate of the same kind." Or, as otherwise defined, "a general legacy is one of quantity merely, and includes all legacies not embraced within the definitions of specific and demonstrative legacies." (13 Amer. & Eng. Enc. Law, p. 10, et seq., and notes; 1 Brick. Dig. pp. 594, 595, § 127 et seq.; *Myers Ex'rs v. Myers*, 33 Ala. 85; *Harper v. Bibb*, 47 Ala. 547; *Maybury v. Grady*, 67 Ala. 147.)

A bequest of all the testator's personal estate is a general bequest. Nor is its character in this regard changed by the fact that a specific part is excepted out of the general bequest, and given to another. (13 Amer. & Eng. Enc. Law, pp. 23-25, notes; *In Re Ovey*, 20 Ch. Div. 676.) Under these definitions, the bequest of personalty in gross to Mahala J. Rothenhofer, and the pecuniary bequests to Mesdames Kelly, Carroll, and Fulmore, are general legacies, and the bequest to J. M. Carroll, of certain merchandise and other property pertaining and belonging to the mercantile business carried on by the testator in his lifetime, is a specific legacy. No demonstrative legacy is given by the will.

As to the character of the devises contained in the will :

At common law, all devises of land, whether given by particular description or residuary clauses, were specific. The soundness of this doctrine — its logical correctness—is manifest when reference is had to that rule of the common law by which wills were held to speak as of the date of their execution, and to embrace only such property as then belonged to the testator, and was within the terms of the testament. Under that rule, as has been well said, “a devise of lands operated in the nature of an appointment upon the land held by the testator at the time of its execution. Hence, whether the land devised was described specifically, or only by way of residue, for practical purposes, it was equally well ascertained,” since the residue then held by the testator was as capable of identification, and was already, indeed, as fully identified in his mind and intention, as the part segregated therefrom by particular description, he being held to know what property he is seised of. And therefore the doctrine we have stated, that even residuary devises are specific, because it is to be assumed the testator had the residue of the land then held by him in his mind, and to have intended it to go to the residuary devisee as specifically as he had intended the lands particularly described to go to other devisees. Some modification of this doctrine has been admitted in American courts, in view of statutory provisions which have the effect of making wills speak from the death of the testator instead of from their execution. Our statute on the subject is the following: “Every devise made by a testator, in express terms, of all his real estate, or in any other terms denoting his intention to devise all his real property, must be construed to pass all the real estate he was entitled to devise at the time of his death.” (Code, § 1948.) Considering that testators could not have had property acquired after the execution of their wills in their minds at that time, and that it is only by force of statute, and wholly apart from the testator’s intent, that such property passes at all, and hence that they could not and did not specifically intend that residuary devisees should

take such property, the tendency of American decisions has been—though the rule is different under similar statutory provisions in England—to hold that no devise of after-acquired real estate is specific, unless the land is described with sufficient particularity to enable the devisee to identify it. (*Farnum v. Bascom*, 122 Mass. 282; *In re Woodworth's Estate*, 31 Cal. 595; 13 Amer. & Eng. Enc. Law, p. 27, note.) This modification has never been considered in Alabama. No case has arisen involving the character of a devise of after-acquired land in this respect; but, while the general doctrine that devises are specific has been adjudged by this court, nothing that has been said is opposed to the limitation of it to property held by the testator at the time of executing the will, and property the acquisition of which was then in contemplation, and which is so described in the will as to enable the devisee to identify it. (*Maybury v. Grady*, 67 Ala. 147, 153; citing *Wallace v. Wallace*, 23 N. H. 149, and *Aldrich v. Cooper*, 2 Lead. Cas. Eq. pt. 1, p. 323 *et seq.*, note.) There being nothing in our own adjudications to the contrary, and conceiving the modification to be sound in principle, we adopt it, and hold, in so far as wills pass real property acquired after execution, the devises are general, and not specific, unless such after-acquired property is so described as to admit of its identification by the devisees. (2 Woerner, Adm'n, p. 967; 3 Red. Wills, 367, note [36]; 4 Kent. Comm. 541, note [1].) Applying the foregoing principles to the will before us, the result is to declare that each of the devises it contains, including the residuary devise to Hermann Perry Dohrmeier, and, of course, the devise by codicil to Mrs. Kelly, is a specific devise, with this possible qualification in respect of said residuary devisee: If any part of the land covered thereby was acquired by the testator after the execution of the will, to the extent of such land, and in respect of it only, the devise is general; such after-acquired land, if any there was, not being described in the instrument.

Coming now to consider the order in which the legacies and devises of this will are to be abated or adeemed by

contribution to the debts of the estate and expenses of its administration, it is first to be observed that by the special terms of the codicil the indebtedness incident to the testator's mercantile business is charged upon the specific legacy of the stock of goods, etc., bequeathed to J. M. Carroll. If this property suffices to pay this indebtedness, with a balance of property remaining, the question is whether such balance is subject to the general indebtedness of the estate, along with other legacies of its class. We think it would be. This property, in the first place, was subject to the general debts of the estate, including the liabilities incurred in the mercantile business; and the general rule is that expressly subjecting property "to certain charges to which it was before liable does not exempt it from its primary liability for other debts not so expressly imposed upon it, upon the principle of '*expressio unius est exclusio alterius*.'" The contrary intent of the testator must be plainly manifested before a different conclusion is authorized. (*Brydges v. Phillips*, 6 Ves. 567; *Davies v. Ashford*, 15 Sim. 42.) We find no expression or clear indices of any other intent on the part of the testator than a purpose to specially charge the legacy to Carroll, with the mercantile debts. There is, indeed, no intimation, and scarcely room for persuasive inference, that he had any purpose to exempt this property at all from the burdens of his estate, further than the law implies from the specific terms in which the legacy is given, the effect of which has relation solely to the order in which it may be subjected to general debts. And we accordingly hold that if the store debts are paid by Carroll, or out of this property, he holds the remnant of it subject to the other debts and to the expenses of administration, as a specific legacy is subject thereto. On the other hand, if this property is exhausted without full payment of the mercantile indebtedness, the unpaid balance, of course, is to be paid, like other debts, out of the general property of the estate.

It is the policy of our laws that both real and personal property are equally liable for the debts of decedents, and

that realty devised and personalty bequeathed shall, where the devise and legacy are of the same character, abate ratably when there is a failure of assets undisposed of by the will, to pay debts. It is in keeping with this policy that the rule by which specific legacies and specific devises are abated ratably by the necessities of contributions to the debts of the estate has come to be established. It follows logically from this policy and this rule in respect to specific dispositions of realty and personalty, respectively, that general devises should contribute ratably with general legacies to debts and expenses of administration, and we so hold. That specific devises and specific legacies abate *pro rata* when there is necessity for either to contribute to debts is a proposition sustained by the weight of authority and reason, and which has been expressly announced by this court. (13 Amer. & Eng. Enc. Law, p. 130 *et seq.*, and notes; *Aldrich v. Cooper*, 2 Lead. Cas. Eq. pt. 1, p. 325 *et seq.*, note; *Maybury v. Grady*, 67 Ala. 147; 1 Rop. Leg. 358.)

As we have seen, there is no residuary bequest in this will. There are general legacies of "all my personal property," with a certain exception, to Mrs. Rothenhofer, and \$500 in money to Mesdames Fulmore, Carroll, and Kelly, severally. There may also be, as we have pointed out, a general devise of after-acquired land to Hermann Perry Dohrmeier. Beyond these, the remaining legacy—that to J. M. Carroll—and all of the devises are specific. The order of abatement is this: The personalty bequeathed to Mrs. Rothenhofer, the pecuniary legacies of \$500 each, and the land acquired after the execution of the will, and embraced in the residuary devise to Hermann Dohrmeier, if any such land is embraced therein, must first, after exhausting assets undisposed of by the will, be taken and made to contribute ratably—that is, in proportion to respective values—to the liabilities of the estate. If, through the full abatement of these general legacies, and this general devise, if any, the liabilities of the estate are not satisfied, the specific legacy to Carroll and each of the specific devises, of which land held at time of executing the will and embraced

in the residuary clause to Hermann constitutes one, shall in like manner be made to contribute *pari passu* to the debts and expenses of administration, and, to the extent of their respective contributions, be abated.

If the paper of June 21, 1887, cannot be, or is not, probated as a codicil to the will, the land embraced in it will necessarily go in specific devise to Herman Dohrmeier, and in his hands be subject, with other specific devises and the specific legacies, to abatement, *ad valorem*, by contribution to debts, etc.

The inquiry as to the source from which the pecuniary legacies are to be derived involves a question of some embarrassment. Clearly, these legacies are not charged upon the realty. Clearly, also, it was the purpose of the testator that they should be paid, and if this intent is to be effectuated it must be out of the personalty of the estate. Yet the terms of the bequest to Mrs. Rothenhofer are sufficiently broad, standing by themselves, to pass to her all of the personalty, including money in hand, belonging to the testator, except that covered by the bequest to Carroll; and we know of no rule of law which authorizes the payment of one general legacy by the abatement of another general legacy or of a specific legacy. So that, if the bequest to Mrs. Rothenhofer is given the broad effect its language admits of, there is no property upon which the pecuniary legacies can be charged, and no fund, even leaving debts out of view, out of which they could be paid; and the intention of the testator as to these legacies would be utterly defeated by his own will, as expressed in another part of the instrument, clearly expressing also this intention. He, as we have said, is holden to a knowledge of the condition of his estate, and it is also to be conclusively presumed that he intended the benefits he has declared to each and all of the legatees named in his will. It appears that both at the time of executing the will, and at the time of his death, he had very considerable tangible personal property, as well as realty, and that he also had money on deposit in bank, (as at the first date,) or in his private depository, (as when

he died.) If he bequeathed this money in part to Mrs. Rothenhofer generally, and in other part to Carroll specifically, he must have known that his beneficent purposes with respect to his sisters, Mrs. Kelly and Mrs. Fulmore, and his sister-in-law, Mrs. Carroll, would be entirely thwarted. To hold that he so intended would be to convict him of the puerile and absurd trifling with these natural objects of his bounty. A construction of the instrument which will avoid such a conclusion, and leave a field for the effectuation of all his testamentary purposes, so far as the exigencies of his estate will admit of, ought to be adopted, if the language he has employed is susceptible of it. We think it is, and that the desired result may well be reached by construing the bequest to Mrs. Rothenhofer to cover and pass only that part of his tangible personal property, not excepted to Carroll, exclusive of money in hand, and by construing the bequest to Carroll not to embrace money in the safe in the store. Under all the circumstances, these interpretations appear to us reasonable, and we adopt them. This view is especially forceful in respect of the bequest to Carroll, since it is entirely improbable that the testator, if he had intended the considerable sum of money then in the store safe to pass,—and the will, in this particular, was executed just before his death,—would have omitted it from the enumeration of various items of property in the store, and given to Carroll, or have supposed he was carrying it by the general phrase. “and every thing belonging in said store.” We hold, therefore, that as to all money belonging to J. T. Perry at that time, he died intestate, and that the pecuniary legacies were payable out of these funds, not, of course, as demonstrative legacies, but as undisposed-of assets of the estate; and in so far as such assets, together with the tangible property bequeathed generally to Mrs. Rothenhofer, were insufficient to pay the liabilities of the estate, and all the general legacies, in full, such legacies—that is, the value of the personalty bequeathed to Mrs. Rothenhofer, and these pecuniary legacies—must abate *pro rata*.

In reference to the executor's rights and duties under the contract between J. M. Carroll and Mrs. Kelly, it will suffice here to say that if at any time he has in his hands money going to Carroll out of the estate, and as an incident, merely, of the administration, he would, in our opinion, be authorized to pay it, to the extent of \$1,550, to Mrs. Kelly; but he is under no duty or obligation, and has no power or authority, to convert the property, personal or real, specifically bequeathed or devised to Carroll into money for the purpose of paying the latter's contract debt to Mrs. Kelly, or into any property so bequeathed or devised to Mrs. Kelly in specie. It may not be out of place to say, further, in respect of the rights *inter se* of Mrs. Kelly and Carroll under their agreements, that the land described in the separate paper which was supposed to be a deed from Perry to Mrs. Kelly—and which we have held must operate as a codicil to Perry's will, if it can be and is probated as such—is not within the terms of said agreements, and will not pass to Carroll thereunder, although thereby Mrs. Kelly released and assigned to him all her interests as devisee and legatee under the will. It was not supposed that this land constituted a devise, and it was clearly not in the contemplation of the parties in entering into this contract.

We have no fault to find with the chancellor's decretal order as to the surrender of devises to the devisees. The case made by the petition to that end, the answer of the executor, and the facts adduced, justified the action taken; and the surrender or delivery of possession to the devisees is so conditional and so limited by the terms of the order that no possible detriment can result to the estate, the creditors, or the executor.

We have discussed several matters which, though involved in the case, as submitted to the chancellor, were not adjudicated by him. This we have done in the hope of expediting the administration and settlement of the estate. In several of the matters adjudged by the chancellor, and presented by the appeal of J. C. Richardson, executor, etc.,

we have reached conclusions different from those declared by the decree below. On the appeal of Richardson, therefore, that decree must be reversed, and the cause will be remanded; costs of appeal, including all cost of transcript, to be paid out of the assets of the estate. Neither Mrs. Kelly nor J. M. Carroll take anything by their cross appeals, and they will, respectively, be taxed with the costs thereof, except cost of making transcript. No appeal was taken by Hermann Dohrmeier, and the assignments of error made by him are stricken out. The questions sought to be presented thereby, however, have been passed upon on the appeal of the executor. Reversed and remanded.

As to instruments in form of deeds operating as testamentary dispositions of property, see note to *Robinson v. Brewster*, *supra*, p. 243.

That specific legacies and specific devises abate ratably on a deficiency of assets, see *Maybury v. Grady*, 67 Ala. 147; 3 Am. Prob. Rep. 375.

As to the abatement of legacies given in lieu of dower, see *Howard v. Francis*, 30 N. J. Eq. 444; 3 Am. Prob. Rep. 321; *Security Company v. Bryant*, 52 Conn. 311; 4 Am. Prob. Rep. 552.

As to when legacies are specific, demonstrative or general, see *Metcalf v. First Parish in Framingham*, 128 Mass. 370; 1 Am. Prob. Rep. 11; *Smith v. McKitterick*, 51 Iowa, 548; 1 Am. Prob. Rep. 49; *Bliven v. Seymour*, 88 N. Y. 469; 2 Am. Prob. Rep. 447; *Maybury v. Grady*, 67 Ala. 147; 3 Am. Prob. Rep. 375; *Fidelity Trust Company's Appeal*, 108 Pa. St. 492; 4 Am. Prob. Rep. 556; *Tomlinson v. Bury*, 145 Mass. 345; 6 Am. Prob. Rep. 261; *Bradford v. Brinley*, 145 Mass. 81; 6 Am. Prob. Rep. 279.

WALKER vs. LEWIS.

[90 Virginia, 578.]

LIFE ESTATE OR FEE TAIL—CONTINGENT REMAINDERS.

A devise to one "for and during his life and after his death to his sons and their heirs forever, equally to be divided among them," passes only a life estate to the first taker, in the absence of anything in the context to show an intention of creating an estate tail

The remoteness of the contingency on which one remainder is limited does not affect the validity of another alternative remainder limited as a substitute if the first one does not take effect.

APPEAL by Walker's administrator from a decree of the Circuit Court of Danville in the consolidated causes *Drumgold v. Lewis* and *Walker v. Lewis*, involving the construction of the will of John Lewis, the clause in question being as follows :

"I give and devise the tract of land on which I now live, lying in Pittsylvania county, and on the north side of the Dan river, containing about 1,300 acres, be the same more or less, to my brother Charles Lewis, for and during his life, and after his death to his son, Nicholas Merewether, for and during his life, and after his death to his sons and their heirs forever, equally to be divided among them. But if Nicholas Merewether should die without leaving a son or son's son who can take the estate, and my brother Charles should have a second son, then, at the death of Nicholas Merewether, I give the said tract of land to the second son of my brother Charles, for and during his life, and after his death to his sons and their heirs forever, equally to be divided among them. But if my brother Charles should have more than two sons, and the two first should die, leaving no son nor son's son living who can take the estate, then I give the said tract of land to the third son of my brother Charles, and after his death to his sons and their heirs forever, equally to be divided among them; and so on to every other son that he may have for life, with like remainders after their deaths to their sons forever, equally to be divided among them. But if my brother Charles should die leaving no son nor son's son capable of taking the estate, then, in that event, I give the said tract of land to the three sons of my deceased brother, Robert, for and during their lives, equally to be divided among them, to wit, John Going, Robert Henry and Merewether Warner, the part of each son at his death to go to his sons, equally to be divided among them and their heirs forever. If one or two of the said sons of my brother Robert should die leaving no son

nor son's son capable of taking his part of the said land, then the part or parts of those that die without leaving sons or son's sons capable of taking shall go to the surviving brother or brothers, and after his or their deaths to his or their sons, equally to be divided among them and their heirs forever. But, if all three of my brother Robert's sons should die without leaving a son or son's son capable of taking the said land, then I give the said tract of land to the sons, living at the time, of my sister, Jane Read, equally to be divided among them and their heirs forever."

Charles Lewis survived the testator, and afterwards died, having had no other son than Nicholas Merewether. The latter died in 1889, unmarried and without issue. Robert Lewis' eldest son, Robert Henry, died in the year 1825, leaving a son, Fielding, who died in 1875, leaving two children, Frank and Annie. The second son of Robert, John Going, died in 1831, unmarried and without issue; and the third son, Merewether Warner, died in 1846, leaving a son, John W., and a daughter. The Circuit Court held that at the death of Nicholas Merewether the contingent remainder to the descendants of Robert took effect, and accordingly decreed that on the death of John Going, the second son, his interest passed, under the will, to his only surviving brother, Merewether Warner, whose son John W. took, at the death of Nicholas Merewether, two-thirds of the estate, and that the other third passed to the children of Fielding. From this decree an appeal was allowed.

Green & Miller, E. B. Withers, and Christian & Christian, for appellants.

E. E. Bonedin and Berkeley & Harrison, for appellee.

LEWIS, P.—It is clear, and we do not understand it to be seriously controverted, that Charles Lewis took under the will, only a life estate. It is contended, however, in opposition to the decree, that Nicholas Merewether, by opera-

tion of the rule in *Shelley's Case*, took a fee tail, converted by the statute into a fee simple. That rule, now abolished in Virginia, is that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word heirs is a word of limitation; so that, if the limitation be to the heirs of his body, he takes a fee-tail; if to his heirs general, a fee-simple. But, clearly, it was not the intention of the testator to give anything more than a life-estate; and the intention, in such a case, must govern in the interpretation of the will, unless the language is used which brings the case within some inflexible rule of law, as in *Moore v. Brooks* (12 Grat. 135), and *Hall v. Smith* (25 Grat. 70), in both of which cases words appropriate to create a fee-tail were superadded to the gift of a life-estate. In the first case, the devise being to M. and B. for and during their natural lives, and then to "their heirs lawfully begotten;" and in the second to M. for life, and then to "the lawful issue of her body," etc. The rule in *Shelley's Case* was therefore held to apply, on the principle stated by Lord REDESDALE in *Jesson v. Wright* (2 Bligh. 1), that "technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise."

But here no such technical words are used. The devise is to Nicholas Merewether, "for and during his life, and after his death to his sons and their heirs forever, equally to be divided among them." Now, here not only is a life-estate given expressly, but the subsequent language is not such as, of itself, to create a fee-tail; for, while a testator may use the word "son" as a word of limitation, it is, in its technical sense, a word of purchase, and was presumably so used in the present case, there being nothing in the context to show the contrary. (3 Lomax Dig. 302; *Moon v. Stone*, 19 Grat. 130, 242.)

It was remarked by Judge LYONS, with great force and propriety, in *Smith v. Chapman* (1 Hen. & M. 240, 302), that since the act of 1776, abolishing entails, he would not

suppose a man intended to convey an estate tail, unless plain and unequivocal words were used, such as would, of themselves, create a fee-tail without resorting to implication, as a devise "to A. and the heirs of his body," or "to A., and if he die without issue," etc.; and added that, to fulfill the plain and manifest intention of the donor, the limitation must be equally plain and express,—not an implied limitation, by mere construction, to enlarge an express estate for life to an estate in fee or fee-tail. (See, also, 2 Minor, Inst. 4th ed. 465; *Taylor v. Cleary* 29 Grat. 448.)

Inasmuch, therefore, as Nicholas Merewether, who was an only son, died without having had a son, the Circuit Court rightly held that at his death the remainder over to Robert Lewis' descendants took effect. It is contended that the latter devise is void because the preceding limitations over were void for remoteness. But its validity is not dependent upon the validity of those limitations; and we need not, therefore, stop to inquire as to their validity. The devise to Robert's sons, etc., was intended as a substitute, to take effect in the event of the failure of the former limitations over to take effect, and as such is valid; it being limited to vest in interest within a life or lives in being, and twenty-one years and ten months thereafter.

It is a well-established rule of the common law that, while no remainder can be limited after a limitation in fee, yet two contingent fees by way of remainder may be limited as substitutes, or alternatives, one for the other, the latter to take effect in case the prior one should fail to vest in interest, and immediately avoided if the first does vest in interest. (1 Lomax Dig. 417; 2 Minor, Inst. (4th ed.) 395; *Cooper v. Hepburn*, 15 Grat. 551, 559). And Redfield, in his work on Wills, in treating of perpetuities, lays it down, on the authority of numerous adjudged cases, that "alternative limitations may be so framed as to be good or bad according to the event; and, if the contingency which is valid occur, the estate will be held legal notwithstanding the other alternative be too remote." (2 Redf. Wills, 573.)

The will further provides that "if one or two of the said

sons of my brother Robert should die, leaving no son nor son's son capable of taking his part of said land, then the part or parts of those that die without leaving sons or son's sons capable of taking shall go to the surviving brother or brothers, and after his or their deaths to his or their sons, equally to be divided among them and their heirs forever."

While this language is not very plain, we are of opinion that the construction put upon it by the Circuit Court is the correct one. Therefore, at the death of John Going, his "part" went to his only surviving brother, Merewether Warner, for life, and at his death to his "sons, equally to be divided among them." Merewether Warner, however, died having had only one son, who survived him, and also Nicholas Merewether, and who, as the Circuit Court decreed, is entitled to two-thirds of the land, the remaining third going to the children of Fielding Lewis, deceased, the only son of Robert Lewis' eldest son, Robert Henry, who died in 1825.

Decree affirmed.

HIBERNIA SAVINGS AND LOAN SOCIETY OF SAN FRANCISCO
vs. VITUS WACKENREUDER *et al.*, Respondents.

[99 California, 508.]

ACTIONS AGAINST EXECUTORS — FORECLOSURE — PRESENTATION
OF CLAIM — LIMITATIONS.

A suit to foreclose a mortgage pending at the death of the mortgagee may be prosecuted to judgment against his personal representatives and heirs without the presentation of the claim to the personal representative as required by Code Civil Procedure, section 1502, if recourse to other property is expressly waived by the complaint as prescribed by section 1500 for bringing an action in such case.

Such waiver in the exact words of that section is not vitiated by a prayer for judgment for the amount and for costs and counsel fee and for a receiver and the application of the net income to any deficiency, though that section forbids any counsel fee in such a case.

Filing a supplemental complaint substituting the heirs and representatives of a mortgagor dying pending a suit for foreclosure is not the commencement of a new action within the meaning of the statute of limitations; Code Civil Proc. Cal. sec. 365, providing that an action shall not abate by the death of a party, but may be continued against his successor in interest.

DEPARTMENT 2.—Appeal from Superior Court, City and County of San Francisco.

Action by the Hibernia & Loan Society of San Francisco against Vitus Wackenreuder and Morris Windt to foreclose a mortgage. Wackenreuder having died, a supplemental complaint substituted his executors, heirs, and devisees as defendants, with one Reynolds, claimant of an interest in the land. Plaintiff appeals from judgment for defendants.

A. Tobin and Thomas F. Barry, for appellant.

T. Z. Blakeman and George D. Shadbourne, for respondents.

DE HAVEN, J.—This action was commenced on June 19, 1885, against Vitus Wackenreuder and Morris Windt, for the purpose of foreclosing a mortgage made by said Wackenreuder to secure the payment of his note which matured on June 29, 1882, and he was properly served with the summons; but for some reason, not disclosed by the record, the cause was not brought to a hearing in his lifetime. Wackenreuder died in August, 1887, and the time for presenting claims against his estate expired on April 11, 1889. The plaintiff did not present for allowance the claim which is the subject of this action. But on June 3, 1889, the court made an order substituting the executors of Wackenreuder as defendants in his place, and permitting the plaintiff to file "an amended and supplemental complaint," which it did on June 13, 1889. In the "amended and supplemental complaint," the executors of Wackenreuder and certain other persons, his heirs and devisees, and one Reynolds, who had made a bid for a portion of the property described in the mortgage, at a sale thereof under an order of the Probate Court, were named as defendants, and appeared

and answered in the action. The supplemental complaint contained, in addition to the matters stated in the original, allegations of the death of Wackenreuder, and the appointment of his executors, who were named as defendants therein, and that the other persons who were named as defendants therein claimed an interest in the property mortgaged, and also contained the following waiver:

"The plaintiff hereby expressly waives all recourse against any other property of the estate of said Vitus Wackenreuder, deceased, other than that which is included and embraced in, and covered by, said mortgage."

The Superior Court found, upon the foregoing facts, that plaintiff's cause of action, as stated in the supplemental complaint, was barred by the provisions of sections 1493 and 1502 of the Code of Civil Procedure, and was also barred, as to the heirs, by sections 312 and 337 of the same Code, and thereupon gave judgment for the defendants. The plaintiff claims that these findings are against the evidence, and this is the only question presented by the appeal.

1. Sections 1493 and 1502 of the Code of Civil Procedure are as follows: "Section 1493. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever." * * *

"Section 1502. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator, for allowance or rejection, authenticated as required in other cases, and no recovery shall be had in the action unless proof be made of the presentations required."

The defendants insist that, as this action was pending at the date of the death of Wackenreuder, and as plaintiff has never presented to the executors of deceased, for allowance, its claim upon the note and mortgages sued on, the case is brought fully within the provisions of sections 1502 of the Code of Civil Procedure, and the plaintiff is not entitled to recover. This argument is based upon the assump-

tion that the section referred to applies to all actions pending against a defendant at the date of his death, and this would be its proper construction if there were no other sections of the Code to be considered than sections 1493 and 1502. But, by section 1500 of the Code of Civil Procedure, it is provided that: "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint, but no counsel fees shall be recovered in such action unless such claim be so presented." Under this section, when the waiver therein provided for is made, claims secured by mortgage (other than a mortgage upon the homestead, which, by section 1475 of the Code of Civil Procedure, must be presented for allowance) are excepted from the operation of section 1493, requiring the presentation of claims to the executor or administrator for allowance; and, by necessary implication, actions upon such excepted claims are not affected by the general rule contained in section 1502 of the same Code. The latter section, when properly construed, refers only to actions upon such claims as are required to be presented to the administrator for allowance under section 1475 of the Code of Civil Procedure, or by the provisions of section 1493 of the same Code, as modified by section 1500. In other words, section 1502 of the Code of Civil Procedure simply means that, when an action is pending against a decedent at the time of his death, the plaintiff therein is not relieved from the duty of presenting for allowance the claim upon which it is based, when the claim is of that character that he would have been required to make such presentation in order to preserve its validity as a claim against the estate if such action had not been brought in the lifetime of the decedent. It is quite true that the language of section 1500 of the Code of Civil Procedure, permitting the holder of the mort-

gage or lien to maintain an action thereon without presentation of the claim to the executor or administrator of an estate, if construed literally, would only apply to an action to foreclose a mortgage or lien when commenced after the death of the mortgagor; but there is no distinction in reason between such an action commenced at such a time, and one which was brought for the same purpose in the lifetime of the mortgagor, and which is pending at the date of his death, and the section should not be construed as making any such distinction. Like all remedial statutes, it should not be confined to cases falling within its exact letter, but it should be given effect according to its reason and spirit.

The object of this section is not only to give to the holder of such a mortgage, or other lien, the right to maintain an action against the representative of the estate, to enforce the same, without presentation of the claim upon which the action is founded, when the waiver provided for is made, but also to relieve the estate from the payment of counsel fees stipulated for in the mortgage, and from the payment of any deficiency judgment; when the mortgagee elects to proceed under it; and this purpose or intention of the law is as fully satisfied when the complaint in an action pending in the lifetime of the decedent is, after his death, so amended as to secure this benefit to the estate of the deceased, as it would be by dismissing such pending action, and commencing a new one, and thus bringing the case within the literal terms of the statute.

In holding, as we do, that section 1502 of the Code of Civil Procedure has no application to an action which, if brought against the administrator or executor in the first instance, could have been maintained without first presenting to such administrator or executor for allowance the claim upon which it is based, our conclusion is not in conflict with anything decided in *Bollinger v. Manning* (79 Cal. 7; 21 Pac. Rep. 375). That was an action to foreclose a mortgage upon a homestead selected by the deceased in his lifetime. By the express provision of section 1475 of

the Code of Civil Procedure, such claim is required to be presented for allowance, and is not within the provisions of section 1500 of the same Code, which permits a mortgage to be foreclosed without such presentation when recourse against all other property of the estate is waived; and the court held that the fact that such action was pending in the lifetime of the deceased did not exempt the plaintiff from the duty of presenting such claim to the representative of the estate, but that section 1502 of the Code of Civil Procedure applied to such a case, and would permit no recovery in the pending action unless the claim was presented as required by law. The distinction between that case and this is broad, and the decision there is in entire harmony with all that is said in this opinion.

2. It is also claimed by respondents that the plaintiff did not, in its supplemental complaint, make the waiver required by section 1500 of the Code of Civil Procedure, and that for this reason the judgment should be affirmed. This argument is based upon the fact that in the prayer for relief the plaintiff asks for judgment for "the amount due upon the said note and mortgage," and for costs "and counsel fees," and "that a receiver be appointed to take charge of the real estate until the same be sold, and collect the rents, and hold the net income therefrom, to be applied to the payment of any deficiency which may remain due to plaintiff after said sale." It must be conceded that the prayer of the complaint is carelessly drawn, but we do not think that this should be allowed to destroy the effect of the express waiver which is contained in the body of the complaint, and which is in the exact language of the statute, and therefore sufficient.

3. It is lastly claimed by respondents that the action is barred by section 337 of the Code of Civil Procedure, which requires an action upon a written contract to be brought within four years after the cause of action thereon accrues. This contention cannot be sustained, in view of the facts appearing in the record. The note which is sued on matured June 20, 1882, and the action was commenced June

19, 1885, which was less than three years after the maturity of the note. The contention of respondents that if the action was not pending at the date of the death of Wackenreuder, within the meaning of section 1502 of the Code of Civil Procedure, then the filing of the supplemental complaint on June 13, 1889, is to be treated as the commencement of a new action is fallacious.

The action was commenced within the time fixed by section 337 of the Code of Civil Procedure, and did not abate upon the death of Wackenreuder, but was continued against his representatives by the order of the court substituting them as defendants in his place, and the subsequent filing of an amended or supplemental complaint, in which the plaintiff waived its right to resort to any other property than that mortgaged in satisfaction of the judgment which it demanded, and which waiver was also, in effect, a waiver of its right to the counsel fees stipulated for in the mortgage, was not the introduction of a new and different cause of action against such representatives, or the other persons named as defendants in the supplemental complaint, who are heirs and successors of the deceased mortgagor. The filing of such supplemental or amended complaint was authorized by section 385 of the Code of Civil Procedure, which provides that an action shall not abate by the death of a party, and that the same may be continued against his representative or successor in interest, and the bringing in of such substituted defendants is not the commencement of a new action against them, but only a step in the progress of the original action to judgment. (*Evans v. Nealis*, 69 Ind. 148; *Evans v. Cleveland*, 72 N. Y. 486.) In the case last cited, the original plaintiff died, and his executrix was substituted as plaintiff therein by the filing of a supplemental complaint, by leave of the court. The supplemental complaint was not filed for more than one year after the original cause of action accrued, and, if the supplemental complaint was to be treated as the commencement of a new action, the cause of action therein stated was barred by the statute of limitations of that state, and this was the contention

of the defendant there; but the court held otherwise, saying :

"It was provided in the old Code (section 121) that no action should abate by the death of a party, but that it might be continued in the name of the personal representative or successor in interest by motion made at any time within a year, or afterward, by supplemental complaint. The service of such complaint was not the commencement of a new action. It was a proceeding in an action which had been commenced, and which was then pending. The action had been commenced within the year after the cause of action accrued, and it is impossible to perceive how any lapse of time, subsequent to the commencement of the action, could bar the action under a statute, which prescribes a limit of time only before the commencement of the action." This reasoning is entirely applicable to the facts of this case, and fully supports our conclusion that the filing of the supplemental complaint in this action was not the commencement of a new action, and that, the original action having been commenced within the time limited by section 337 of the Code of Civil Procedure, the cause of action stated in the supplemental complaint is not barred by the provisions of that section. Judgment and order reversed.

We concur: MCFARLAND, J.; FITZGERALD, J.

JACOB B. PEDRICK, Appellant, vs. ALFRED C. PEDRICK,
et al., Respondents.

(50 N. J. Eq. 479.)

POWERS—BY WHOM EXECUTED—CONDITIONAL BEQUEST.

The power conferred on an executor by a bequest of money, to be paid to the legatee at such times and in such sums as the executor should deem most for his good, and directing that if he should not make a good use of "his money" the executor should pay him no more than sufficient to decently

clothe and board him, is in the nature of a trust which on the death of the executor before its execution, will be executed by the court directly or through a new trustee.

The legatee being 68 years of age, of sober and frugal habits, having for 15 years received from the executor about \$800 a year, and having saved about \$1,000, though he had been unsuccessful in some small business ventures, has sufficiently shown that he makes a proper use of his money to justify the payment to him of the whole legacy.

APPEAL from Court of Chancery.

Bill by John R. Pedrick against Alfred C. Pedrick and others for the payment to the complainant of the sum of \$18,000, with interest, in the hands of the administrators of the deceased executor of the will of his father, Joseph D. Pedrick, deceased, being the fund created for the benefit of the complainant under the fourth clause of the will which reads as follows:

"Fourth. All the rest and residue of my estate whatsoever and wheresoever (after the above-mentioned bequests and devises are excepted) I give, devise, and dispose of as follows: One equal third part thereof to my son Jacob B. Pedrick, to be paid to him by my executor at such times and in such sums as he, my said executor, shall deem most for his good; and if my said son shall not make a proper use of his money, then I direct my said executor to pay him no more than will be necessary to board and clothe him in decent and respectable manner. And if the said Jacob B. Pedrick shall happen to die before receiving the whole of his money, and without leaving lawful issue, then I direct that the balance shall go into and make part of the residue of my estate; if he shall leave lawful issue, the said balance to be paid to them in equal shares." The Chancellor decreed that \$5,000 should be paid to complainant as a means of testing whether he was fit to be intrusted with the whole amount, from which decree complainant appeals.

M. P. Grey, for appellant.

H. M. Cooper, for respondents.

PER CURIAM.—We agree with all the conclusions of the opinion except that respecting the disposition of the fund in dispute.

It was properly held that the will of Joseph D. Pedrick conferred on his executor a power in the nature of a trust, which, not having been executed by the executor in his lifetime, should now be executed by the Court of Chancery, either directly or by the intervention of a new trustee. That power was to determine when and in what sums the fund in question should be paid to appellant so as to be most for his good, and to pay him such sums. Then, if he should not make proper use thereof, to pay him only so much as would be necessary to board and clothe him in a decent and respectable manner.

Doubtless this provision of the will was designed to be so executed as to test the conduct of appellant in his use of the money paid him.

In the opinion of the Chancellor, the conduct of the appellant in this respect has not been sufficiently tested. We are unable to agree with this view.

The evidence discloses that for fifteen years the deceased executor paid appellant about \$800 a year. He is now about sixty-eight years old, unmarried, and of sober and frugal habits. The evidence produced by those interested in withholding the fund from him indicates no trace of a wasteful or extravagant disposition. It shows, at the most, the failure of some small business ventures undertaken by appellant. Considering his lack of capital, the failure of these undertakings does not necessarily indicate lack of business capacity; on the contrary, his withdrawal therefrom with but small loss indicates prudence and care; for, notwithstanding such losses and his small income, he has succeeded in saving nearly \$1,000.

A consideration of the evidence satisfies us that the conduct of appellant has been sufficiently tested, and that he has made a proper use of the money paid him. We also deem it plain that it is most for his good that the whole of the fund should now be paid to him.

The decree must therefore be reversed, and a decree made in conformity with these views.

IN THE MATTER OF THE ESTATE OF M. W. NICKALS,
DECEASED.

[21 Nevada, 462.]

FOREIGN GUARDIAN—APPOINTMENT AS ADMINISTRATOR.

A guardian appointed by a court of another state is not entitled to letters of administration in the right of his ward under General Statutes (Nev.), § 2724, providing that when a person entitled to the letters shall be a minor they shall be issued to the guardian.

A guardian has no rights in a state other than that of his appointment, except as a matter of comity in exceptional cases.

APPEAL from District Court, Eureka county.

The facts fully appear in the following statement by BIGELOW, J.

The testator, a resident of Eureka county, in this state, died October 25, 1892, leaving a wife and six minor children, his mother, and a sister, Mrs. Isabella M. Loucks. By his will, executed in 1889, the widow was appointed executrix, but it is alleged that she left this country for Germany, in September, 1892, and has never since been heard of. The children and the testator's mother are residents of Oakland, California, and Mrs. Loucks is a resident of Eureka county, Nevada. The widow having failed to take out letters testamentary, Mrs. Loucks, on March 20, 1893, made application that letters of administration with the will annexed issue to herself and one Marshall Rich, who she asked to be joined with her in the administration. The testator's mother also asked that they be appointed. G. W. Flick, a resident of Oakland, California, who had been appointed by the courts of California guardian of the minor

children, opposed this application, and asked that letters be issued to himself, upon the ground that as such guardian he had the preferred right thereto. Upon the hearing, it was ordered that letters issue to him, and Mrs. Loucks and Rich appeal.

Rives & Judge, for appellants.

Baker, Wines & Dorsey and *R. M. Beatty*, for administrator.

BIGELOW, J. (after stating the facts).—The only question involved in this appeal is, who has the preferred right to letters of administration upon the estate of the deceased? There is no dispute concerning the facts, and there is neither allegation nor proof that either of the applicants is not duly qualified to discharge the duties of the trust. It consequently becomes simply a matter of statutory construction, as the right to the appointment is given by law, and the court has, under these circumstances, no discretion concerning it. (*Coope v. Lowerre*, 1 Barb. Ch. 45; *In re Estate of Pacheco*, 23 Cal. 480; *Estate of Bauquier*, 88 Cal. 302, 310; 26 Pac. Rep. 178, 532; *Hayes v. Hayes*, 75 Ind. 395, 398; 1 *Woerner, Adm'n*, § 242.)

Gen. St. § 2719, provides the following order for the appointment of administrators: "First. The surviving husband or wife, or some person as he or she may request to have appointed. Second. The children. Third. The father or mother. Fourth. The brothers. Fifth. The sisters. Sixth. The grandchildren. Seventh. Any other of the kindred entitled to share in the distribution of the estate. Eighth. The public administrator. Ninth. The creditors. Tenth. Any of the kindred, not above enumerated, within the fourth degree of consanguinity. Eleventh. Any person or persons legally competent."

Section 2722: "No person shall be entitled to letters of administration who shall be: First, under the age of majority."

Section 2724: "If any person entitled to letters of administration shall be a minor, administration shall be granted to his or her guardian."

Section 2733: "Administration may be granted to one or more competent persons, although not entitled to the same, at the request of the person entitled to be joined with such person."

Section 2734: "When letters of administration have been granted to any other person than the surviving husband or wife, the child, the father, mother, or the brother of the intestate, any one of them may obtain the revocation of the letters by presenting to the Probate Court a petition praying the revocation, and that letters of administration be issued to him or her."

As suggested in the *Estate of Woods* (97 Cal. 428, 32 Pac. Rep. 516), concerning a similar statute, there is doubtless some difficulty in construing and harmonizing these somewhat conflicting sections so as to determine when the guardian of a minor will have a preferred right to letters of administration over other applicants, but we do not find it necessary to consider the matter here. It is admitted that the respondent has no right to the letters except under his appointment as guardian by the California court, and, as such, we are of the opinion that he does not come within the meaning of section 2724. Except as a matter of comity, and to a very limited extent, guardians appointed in one state are not recognized as such, or as having any power or authority, in any other state. Speaking of an English decision holding the authority of an English guardian sufficient to institute a suit for the personal property of his ward in Scotland, Judge STORY says: "It has certainly not received any sanction in America in the states acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local, and as not entitling them to exercise any authority over the person or personal property of their wards in other states, and upon the same general reasoning and policy which have circumscribed the rights and authorities of

executors and administrators." (Story, Conf. Law, § 499.) The same rule applies to real estate. (Id. § 504.) This language is repeated and approved in Whart. Conf. Laws § 261, and in *Hoyt v. Sprague* (103 U. S. 613, 631,) and is certainly the law as understood and administered in the United States. (Cooley, Const. Lim. 414; Schouler, Dom. Rel. 445; *Leonard v. Putnam*, 51 N. H. 247.) In other words, as to any other state than the one of the appointment, except as a matter of comity, he is no guardian, and has no rights as such. On the other hand, we have in Gen. St. § 548 et seq., a complete system for the appointment of guardians of minors by our own courts, who would in this state be vested with all the authority that a guardian could have anywhere; and to our minds it is very clear that it was this kind of a guardian, instead of one that has no authority or responsibility, that the legislature had in mind in the enactment of section 2724, regulating the settlement of the estates of deceased persons.

The statute of 1887, p. 58, authorizing the payment of money in certain cases to guardians appointed in other jurisdictions, rather strengthens than otherwise this view, as it tends to prove that without such statutory authority the guardian appointed in another state has no standing before our courts.

It follows that the appellants have the preferred right to the letters of administration in this case, and should have been appointed.

The order is reversed, with directions to the District Court to issue letters to the appellants, upon their taking the oath of office and giving the necessary bonds.

MURPHY, C. J., and BELKNAP J., concur.

JAMES S. MACDONALD AND WILLIAM J. MACDONALD vs.
WILLIAM HANNA AND ISABELLA MACDONALD BARNARD.

[100 Michigan, 412.]

JOINT EXECUTORS—FAILURE TO ACT—ACCOUNTING.

A will by which all of testator's property is given to his wife "in the hope that she will manage and control it to the best of her judgment and ability for the benefit of the children during her widowhood, and which in the event of her remarriage directs the sale of the property and that the other executor named, the wife being one of them, shall apply the proceeds for the benefit of the children, does not contemplate that such other executor is to take any part in the administration of the estate until the remarriage of the widow.

Such other executor is not liable for any misappropriation by the widow.

Nor is he under any compulsion, on the remarriage of the widow, to demand from her the administration of the trust.

The widow having received \$7,000 of the husband's estate, of which she lost nearly \$5,000 in a speculation and having properly supported the children and sent them to school for several years, both before and after her remarriage, and having been compelled to draw on the principal for her support and that of the children, an award of \$2,500 to the children is not insufficient; no account of expenditures having been kept and no fraud being shown.

APPEAL from Circuit Court, Wayne County, in Chancery;
Cornelius J. REILLY, judge.

Action by James S. MacDonald and another against William Hanna and another. From a decree in their favor, complainants appeal.

Sands F. Moore (*Alfred Lucking*, of counsel), for appellants.

John H. Bissell (*Otto Kirchner*, of counsel), for appellee Barnard; *James C. Smith, Jr.* (*Otto Kirchner*, of counsel), for appellee Hanna.

GRANT, J.—Complainants are the children of John MacDonald, deceased, and defendant Barnard. MacDonald died testate at Windsor, Ontario, January 15, 1870. His will

reads as follows: "First. All my real and personal estate, of any nature and kind whatsoever, and wheresoever situate, I give, devise and bequeath unto my beloved wife, Isabella MacDonald, in the hope that she will manage and control the same to the best of her judgment and ability, during her widowhood, for the benefit of my children, James Sherman and William John MacDonald. And, in the event of my said wife marrying again, my will is that she shall take nothing from this will after she so again marries, but that the residue of my real estate and personal estate acquired by her through or by the above bequest be sold or otherwise disposed of, and the proceeds or profits arising thereout be applied by William Hanna, one of my executors hereinafter named, for the use and benefit of my children before named when they each, or the survivor, attains the age of twenty-one years.

"And I enjoin upon my said wife the maintenance, education and support of my said children.

"And I hereby appoint my said wife and William Hanna, of the city of Detroit, executors of this, my last will."

The defendants petitioned the Surrogate Court of the county of Essex, January 26, 1870, for the probate of the will. On the same day each filed a separate affidavit, stating that he was one of the executors of the will, and that he would faithfully administer the personal estate and effects of the testator by paying his just debts, and the legacies contained in the will, so far as the same would thereunto extend, and the law bind him, and that he would exhibit a true and perfect inventory of, all and singular, the personal estate and effects, rights and credits of the said testator, and render a just and true account of his executorship, as required by law. January 20, 1870, defendant Hanna filed an affidavit stating that he was one of the executors named in said will, and that the personal estate and effects of the deceased were of about the value of \$17,068. February 8, 1870, letters of administration were issued. A statement was filed in the Surrogate Court showing the assets to be \$17,068.26, and liabilities \$10,441.71. In this

statement the book accounts were stated at \$7,432.79. Defendant Hanna, as executor, received none of the funds belonging to the estate, except that at one time he borrowed from the widow \$2,000, for which he gave his note, and which he subsequently paid to her. Defendant Barnard received all the funds. Neither gave a bond, nor was any account ever filed by either in the Surrogate Court.

MacDonald was engaged in the business of manufacturing tobacco. March 3, 1870, Mrs. MacDonald sold the business, and after paying the debts, etc., she had on hand, belonging to the estate, about \$5,500. This she brought to Detroit, and converted into American money, which yielded about \$7,000. At the time of the death of Mr. MacDonald, complainants were, respectively, about seven and five years of age. Upon her marriage to Mr. Barnard, she moved with him to L'Anse, Mich., where they resided until the complainants grew up and left home. In so far as any further statement of facts is necessary, it will be given in connection with the points raised.

Complainants allege that they first learned of their father's will, and the amount of property he left, in the year 1889; that they caused investigation to be made, which consumed some time; that their mother refused an accounting, and therefore they filed this bill. The case was heard upon pleadings and proofs taken in open court, and a decree was entered dismissing the bill as to defendant Hanna, and against the defendant Barnard for the sum of \$2,500. Complainants, alone, appeal.

1. The decree in favor of defendant Hanna must be sustained. Whatever may have been his moral obligation to accept the trust set forth in the will, and to look after the interests of the children, there was no legal duty imposed upon him, and he could only be held in so far as he received and misappropriated the funds. It is manifest from the terms of the will that Mr. MacDonald intended that, until his wife remarried, she should have the management and control of the estate. It cannot be said that there was any obligation, either moral or legal, resting upon Hanna, to

assume the responsibility of the execution of the trust, until after her remarriage. He certainly could not be held liable for any misappropriation of the funds by her during that time. Neither was he compelled, upon her remarriage, to demand from her the administration of the trust. The authorities are clear that he cannot be held, under such circumstances. (*Edmonds v. Crenshaw*, 14 Pet. 166; *Cocks v. Haviland*, 124 N. Y. 426; 26 N. E. Rep. 976; *McKim v. Aulbach*, 130 Mass. 484; *Sparhawk v. Buell*, 9 Vt. 41; *Manahan v. Gibbons*, 19 Johns. 427; *Wilson's Appeal*, 115 Pa. St. 95; 9 Atl. Rep. 473.)

2. Mrs. Barnard kept no books of account, nor has she ever rendered an account of her doings to the Surrogate Court. The bookkeeper who made out the inventory of the estate is dead. So, also, are others who had knowledge of Mr. MacDonald's affairs. The books have been lost. Mr. MacDonald evidently did a prosperous business during his lifetime, and provided liberally for his family. Some of the household goods, which were her property, were included in the inventory as belonging to the estate. It seems quite probable from her own testimony that Mrs. Barnard, during her widowhood, lived in a style commensurate with her former living, rather than in one suitable to her altered condition and limited means. She paid the funeral expenses, and the expenses of his last sickness, and also erected a monument, at a cost of about \$300. She testified that it cost her about \$125 per month to support herself and the children during her widowhood. At the time of her remarriage she supported the children for a short time at her sister's, and then took them to her home at L'Anse, paying the expenses of the trip. She invested \$5,000 out of the \$7,000 in real estate in Detroit. This investment proved unfortunate, and nearly the entire amount was lost. The complainants lived for many years with their mother and stepfather, were sent to school, and were properly clothed and supported. Their stepfather secured them positions upon the railroad. James went to Marquette, but did not earn sufficient to pay his board. His

mother paid the deficiency, and furnished him with clothing. It is unnecessary to review all the evidence in the case bearing upon the expenditures of the mother in behalf of the complainants. It is manifest that they were well treated, well taken care of, and largely at her expense. It would not be equitable to deprive her of a reasonable allowance for that purpose. During her widowhood the income from the estate was not sufficient, and she possessed the right, under the will, to encroach upon the principal. It is evident that she had no comprehension of business affairs, and did not appreciate the necessity of keeping a strict account of her receipts and expenditures. It is also unfortunate that the Surrogate Court did not call her to an accounting. But we find no evidence of bad faith, nor any disposition to defraud her children. After a careful examination of the record, we are not disposed to modify the decree of the court below.

Decree affirmed, with costs.

The other justices concurred.

In the Matter of the Estate of E. B. MALLORY vs. BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA.

[53 Kansas, 557.]

**ADMINISTRATION—NON-RESIDENT—REVOCATION OF LETTERS—
APPEAL BOND.**

The grant of letters of administration on the estate of a non-resident of the state, who leaves no property in the state to be administered, is a nullity. Such letters may be revoked by the court granting them, of its own motion or on the application of any one interested in the administration.

The defendant in an action by an administrator so appointed, has such an interest in the administration as to entitle him to make such application.

An appeal by a person to whom letters of administration have been issued without jurisdiction, from an order declaring such letters null and void, is not an appeal by an administrator within Gen. Stat. Kan. 1889, par. 2977, (Civil Code, sec. 577), providing that an executor or administrator is not required to enter into a bond to entitle him to appeal.

Application by the Burlington & Missouri River Railroad Company in Nebraska for the revocation of letters of administration issued to Fannie Mallory on the estate of E. B. Mallory, deceased. From an order revoking such letters, said Fanny Mallory, administratrix, brings error.

Geo. H. Roberts, for plaintiff in error.

W. W. & W. F. Guthrie, for defendant in error.

JOHNSTON, J.—The District Court of Atchison county dismissed an appeal from an order of the Probate Court of the same county revoking letters of administration which had been previously granted to Fannie Mallory, as administratrix of the estate of E. B. Mallory, deceased, and a review of this ruling is sought. It appears that, after her appointment as administratrix, she brought an action against the Burlington & Missouri River Railroad Company in Nebraska to recover damages for the injury of Mallory through the alleged negligence of the employes of the railroad company. At the suggestion and upon application of the railroad company, a hearing was had before the Probate Court in regard to whether any grounds existed for administration, and as to the validity of the letters which had been issued. Both parties appeared, and, upon the testimony submitted, the court found that the decedent was not a resident or inhabitant of Kansas at the time of his decease, nor did he die intestate in any other state or county than the state of Kansas, leaving any estate to be administered within the state of Kansas, nor, especially, any estate to be administered within the county of Atchison, nor was there any such estate to be administered in the state of Kansas or county of Atchison. The conclusion was that the letters were issued without jurisdiction, and that such

letters, and the administration proceedings thereon, including the appointment and qualification of Fannie Mallory as administratrix, were without jurisdiction in that court, and were null and void. An appeal was attempted to be taken to the District Court by Fannie Mallory, after which the railroad company appeared there, and moved to dismiss the appeal on the insufficiency of the affidavit for appeal; the failure to give an appeal bond, and other grounds which need no mention.

The facts found by the Probate Court make it clear that it had no jurisdiction to issue letters of administration, and it ruled correctly in holding that its action in that respect was void for all purposes. (*Perry v. St. J. & W. R. Co.*, 29 Kan. 420.) As the right of Fannie Mallory to maintain an action against the railroad company was based upon the letters of administration, it was proper for the company to inquire into the authority upon which she acted. If the Probate Court had no jurisdiction, and the letters were void, they conferred no power upon her to prosecute such an action, and recovery by her would not bar a subsequent suit by a legal administrator upon the same cause of action. It has been held that, where letters of administration have been issued without authority, the court in which they were issued may, upon its own motion, institute proceedings to set them aside, or it may be done by any one interested in any wise in the estate, or upon suggestion of an *amicus curiae*. (*Railroad Co. v. Swayne*, 26 Ind. 477; *Woerner Adm'n*, § 268.)

The affidavit for appeal is defective, but the principal, and a sufficient ground for the order of the District Court dismissing the appeal was the omission of the appellant to give an appeal bond. Under the statute, every appellant is required to file in the Probate Court a bond, in such sum, and with security, as may be fixed and approved by the Probate Court, conditioned that he will prosecute the appeal, and pay all sums, damages, and costs that may be adjudged against him. The only exception to this rule is that no executor or administrator is required to enter into

bond, to entitle him to appeal. (Gen. St. 1889, par. 2977; Civ. Code, §577.) The only excuse given for the failure to give an appeal bond is the claim that the appeal was taken by the administratrix, and therefore that she was exempt from that requirement. The difficulty in sustaining that claim is that her appointment, and everything pertaining to the administration, were utterly invalid. The Probate Court had no jurisdiction to grant letters of administration, nor to confer authority upon her, and at the time when the attempt was made to take an appeal the letters had been recalled, and an order and decree entered declaring the administration, and all the proceedings connected with the same, null and void. In attempting to appeal, she was not acting as the representative of the estate, but was merely endeavoring to obtain a personal advantage. Not being an administratrix, it was absolutely necessary that a bond should be given before an appeal could be taken, and her failure to give one is a sufficient justification for the ruling of the court in dismissing the appeal. The judgment will be affirmed.

All the justices concurring.

IN THE MATTER OF THE ESTATE OF LUCY WERINGER,
DECEASED.

[100 California, 845.]

MARRIED WOMEN—MEDICAL ATTENDANCE—FUNERAL EXPENSES
—MONUMENT—LIABILITY OF HUSBAND—FAMILY ALLOW-
ANCE

A husband having means, is liable for the expenses of doctors, nurses and medicines obtained by him for his wife in her last illness, and for the expenses of her funeral and placing upon her grave some mark of identification, and these expenses are not chargeable against her estate.

If the husband is poor and the wife leaves a considerable estate a reasonable amount may be allowed to him towards the expense of erecting a tombstone.

An administrator is properly credited with the amount paid for family allowance without a voucher therefor, as it will be presumed that the court made an order granting such allowance.

DEPARTMENT I. Appeal from Superior Court, Kern county.

From a decree settling the accounts of the administrator of Lucy Weringer, deceased, the distributees appeal.

Mahon & Laird, for appellants.

E. Brundage, for respondent.

PATTERSON, J. — This is an appeal from a decree settling an annual account of the administrator.

Among the items allowed were the following: "Dr. Cook, medical services last illness, \$45.50 ; Dr. Ferguson, same, \$10.50 ; Dr. Rogers, same, \$50 ; Blodget & Dudley, drugs, \$18.35 ; Mary Dougherty, nurse last illness, \$25." We think the objections to these items were properly taken by the contestant, and that they were improperly allowed. (Section 174, Civil Code ; *Gerlach v. Terry*, 75 Cal. 290; 17 Pac. Rep. 207.) The administrator testified as follows: "Before and at the time that my said wife, Lucy Weringer, died, I was engaged in business in Bakersfield, and was handling large sums of money. I also owned considerable valuable real estate and personal property. I called in the doctors to attend to my wife during her last illness. The nurse, Mary Dougherty, I hired to wait upon and care for my wife during her last illness."

At common law the husband was bound to bury his deceased wife in a suitable manner, and was bound to defray the necessary funeral expenses. Although the rule is not universal in this country, it prevails in most of the states. (Schouler, Dom. Rel. § 199.) The duty is one which is involved in the obligation of the husband to maintain the wife while living. He has the control of the body of

his deceased wife, and must care for the same, and may select a proper place for the interment, regardless of the wishes of her parents or other relatives. (*Staples' Appeal*, 52 Conn. 426; *Smyley v. Reese*, 53 Ala. 89.)

It is claimed by appellants that the court improperly allowed the item of \$2,000 on account of family allowance, but there is nothing in the record upon which such contention can be sustained. The court may have made an order granting family allowance which authorized payment by the administrator of the amount named, and, that being so, no voucher was required. Error must be shown; it cannot be presumed.

The court allowed an item of \$670 for "funeral expenses and monument." It does not appear how much of the item was for the monument. Whether or not the administrator ought to have been allowed anything on account of the monument depends upon circumstances. Included in the obligation to give his deceased wife decent burial is the duty of placing some mark of identification over her last resting place. If the husband be poor, and the deceased leave a considerable estate, the former ought not to be expected to contribute much to a monument; and it would be proper in such a case, we think, for the court to fix a reasonable amount to be allowed for that purpose. The amount allowed for the expenses of the funeral and a monument should be governed by the custom of people of like rank and condition in society; a distinction being made in this respect, however, between solvent and insolvent estates. (2 Woerner, Adm'n, § 359.) The order is affirmed as to the family allowance, but is reversed as to the other items, and the cause is remanded, with directions to the court below to hear the parties further, and determine the matter in accordance with the views herein expressed.

We concur: HARRISON, J.; GAROUTI J.

common law, the husband is bound to furnish his wife. *Cothran v. Lee*, 24 Ala. 380; *Nelson v. O'Neal*, 11 Ind. App. 296; 39 N. E. Rep. 207; *Nelson v. Spaulding*, 11 Ind. App. 453; 39 N. E. Rep. 169; *Freeman v. Cort*, 27 Hun (N. Y.) 447, 450; *Estate of Shipman*, 22 Abb. N. C. 289, 291; N. Y. Supp. And among the expenses of the family for which under the statutes of some of the states, the property of the wife is bound jointly with that of the husband. *May v. Smith*, 48 Ala. 483; *Glaubenslee v. Low*, 29 Ill. App. 408; *Schrader v. Hoover*, 80 Iowa, 243; 45 N. W. Rep. 734; *Alexander v. Lydick*, 80 Mo. 341, 347. They are not the less expenses of the family though rendered to or at the request of the husband. *Younkin v. Essick*, 29 Ill. App. 575; *Walcott v. Hoffman*, 30 Ill. App. 77; though the contrary was held in *Gabriel v. Mullen*, 30 Mo. App. 464, 471. The statutes removing the disabilities of married women and enabling them to contract with reference to their separate estates do not render them liable for such services in the absence of an express promise. *Nelson v. O'Neal*, 11 Ind. App. 296; 39 N. E. Rep. 207; *Nelson v. Spaulding*, 11 Ind. App. 453; 39 N. E. Rep. 169; *Estate of Shipman*, 22 Abb. N. C. 289, 291; 5 N. Y. Supp. 559; *Berger v. Clark*, 79 Pa. St. 340; *Sawtelle's Appeal*, 84 Pa. St. 306. And it has been held that she cannot bind herself by her express promise to pay for them. *Thomas v. Passage*, 54 Ind. 106, 114; though the better opinion seems to be that she can. *Nelson v. Spaulding*, 11 Ind. App. 453; 39 N. E. Rep. 169; *Yates v. Lurvey*, 65 Me. 221. And it has been held that the husband is not liable for them if she is living apart from him, without fault on his part. *Bevier v. Galloway*, 71 Ill. 517.

The husband has, therefore, no valid claim against the estate of his deceased wife, for the expenses of medicines and medical attendance incurred by him for her. *Cothran v. Lee*, 24 Ala. 380; *Yates v. Lurvey*, 65 Me. 221; *Galloway v. Estate of McPherson*, 67 Mich. 546; 35 N. W. Rep. 114; *Freeman v. Coit*, 27 Hun (N. Y.) 447, 450; *Estate of Shipman*, 22 Abb. N. C. 289, 291; N. Y. Supp.; *Costigan's Estate*, 13 Phil. (Pa.) 264; *McCormick's Estate*, 4 Kulp. (Pa.) 15.

Involved in the duty of maintaining the wife while living is the duty of burying her on her death. *Smyley v. Reese*, 53 Ala. 89, 97; *Cunningham v. Reardon*, 98 Mass. 538. It is the husband's right and duty to bury his deceased wife. *Durrell v. Hayward*, 75 Mass. (9 Gray), 248; *Weid v. Walker*, 180 Mass. 422, 423. The husband is liable for the reasonable expenses of the funeral. *Sears v. Giddey*, 41 Mich. 590, 592; 2 N. W. Rep. 487; *Galloway v. Estate of McPherson*, 67 Mich. 546; 35 N. W. Rep. 114; though the wife has a separate estate which she bequeaths to some one else. *Sears v. Giddey*, 45 Mich. 590; 2 N. W. Rep. And if they have been living apart it is unnecessary to notify him of her death to render him liable. *Cunningham v. Reardon*, 98 Mass. 538. In an action against a husband for removing a stone erected at the grave of his wife by her mother. *BIGELOW, J.*, said: "The undisputable and paramount right, as well as duty of a husband, to dispose of the body of his deceased wife by a decent sepulchre in a suitable place, carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well known and long established usage of the community." *Durrell v. Hayward*, 75 Mass. (9 Gray), 248.

Nor is the husband entitled to reimbursement by the estate of his deceased wife for the expenses of her funeral incurred by him. *Galloway v. Estate of McPherson*, 67 Mich. 546; 85 N.W. Rep. 114; *Costigan's Estate*, 13 Phil. 264; *McCormick's Estate*, 4 Kulp. (Pa.) 15.

Under statutes making funeral expenses a preferred charge against the estate of a decedent, the estate of a married woman is liable. *Buxton v. Barrett*, 14 R. I. 40; *Petition of Johnson*, 15 R. I. 438; 8 Atl. Rep. 248. In *Constantinides v. Walsh* 146 Mass. 281; 15 N. E. Rep. 631, it was said: "The funeral expenses of the testatrix were a preferred charge on her separate estate." Pub. Stat., ch. 135, sec. 3; chap. 137, sec. 1; Stat. 1882, chap. 141. Under these statutes and those establishing the independent position of married women with regard to their property, we think that, as between the estate of a married woman leaving property, and her husband, the liability of the estate must be regarded as primary, and that it would be unreasonable to charge the husband for the funeral expenses, in all events, as necessities, irrespective of any fault on his part. If then, it was still, as formerly the plaintiff's legal duty to see that his wife was buried, but her estate was primarily liable, he is entitled to recover his reasonable expenditures, as in other cases where a person has paid, in pursuance of a legal duty, what, as between himself and another that other was bound to pay." The fact that it is the duty of the husband to bury his deceased wife does not exempt her separate estate from the ultimate charge. *Jackson v. Westerfield*, 611 How. & Pr. 399, 403. And though he is liable to the undertaker, if the wife leaves assets sufficient to pay the expenses of the funeral; he can recover from the executors the amount that he may pay to the undertaker. *Lucas v. Hessen* 17 Abb. N. C. 271; 2; 13 Daly, 368; *Kessell v. Hapen*, 8 N. Y. S. R. 352; *Kessler v. Hessen*, 19 Abb. N. C. 86; *Freeman v. Coit*, 27 Hun, 447, 450.

In *McCue v. Garvey* (14 Hun, 562, 564), it was said: "It may be, and probably is the law, that a husband is bound to bury the corpse of his deceased wife, and he is probably liable in an action to any person who, by reason of his absence or neglect, incurs the expense of the burial. It is probably also the duty of any person under whose roof a dead body lies to see that it has decent burial. But none of these rules exempt the estate of the deceased person from the final charge of such expenses. They are intended to secure prompt and proper burial, to which all are entitled. In this case the deceased wife has a separate estate, and her husband paid the expenses of her funeral, and there is no reason why he should not be allowed therefor, in the settlement of her accounts as her personal representative. If this lady had died under the roof of a stranger, the duty of the interment would have devolved upon him, in the first instance; and then, if he had been her executor, or administrator, the expenses would have been allowed to him by the surrogate in the settlement of his accounts. Why not now? Why should her separate estate be exempt from the payment of her funeral expenses because she happens to have left a husband surviving her, when there would be no pretense for such exemption if she had not. The simple fact that it was the duty of the husband to bury his deceased wife is not sufficient, for we have seen that it is the duty of other persons to bury the deceased wife in the absence of the husband."

But in Pennsylvania it is held that the husband is primarily liable for the expenses of the wife's funeral, though the undertaker may recover from her estate, and the amount will be deducted from the distributive share of the husband. *Darmody's Estate*, 13 Phil. 207; *Weber's Estate*, 20 Phil. 8; *Waesch's Appeal*, 8 Pa. Dist. R.; s. c., 166 Pa. St. 204; 80 Atl. Rep. 1124.

BYERS *vs.* MCAULEY; MCAULEY *vs.* MCAULEY

[149 U. S. 608.]

ADMINISTRATION OF ESTATES — JURISDICTION OF FEDERAL
COURTS—DECLARATION OF TRUST—NEXT OF KIN.

An estate which is being administered in a State Probate Court is so far in the possession and custody of that court, that on a bill filed by a citizen of another state against the administrator to recover a share of the property, the Federal Court acquires no jurisdiction to make a decree of distribution, or determine the rights of the citizens of the same state among themselves. It can only determine and award the shares of citizens of other states.

A writing directing that pursuant to the request of the brother from whom certain property was inherited, it is to be sold after the death of the maker and the proceeds applied in a specified manner, though ineffective as a will may operate as a declaration of trust.

Under the statutes of Pennsylvania first cousins of an intestate are entitled to take to the exclusion of second cousins.

APPEALS from Circuit Court of the United States for the
Western District of Pennsylvania.

Bill in equity by Henry B. Shields, a resident and citizen of the state of Ohio, as assignee of James McAuley, a citizen of the state of Kansas and also in the right of his wife Melissa M. Shields, also a resident and citizen of Ohio, against Alexander M. Byers, administrator, with the will annexed of Mary McAuley, and the other parties claiming to be interested in the estate, including the Home for the Friendless and the Home for Protestant Destitute Women. The instrument admitted to probate as the will of Mary

McAuley was entirely in her handwriting, and is in the following words: "By request of my dear brother, my house on Duquesne Way is to be sold at my death and the proceeds to be divided between the Home for the Friendless and the Home for Protestant Destitute Women, Mary McAuley." The house mentioned in the will had been devised to Mary McAuley and her sister by their brother James McAuley, and on the death of the sister her interest also passed to Mary.

The account of Byers, filed by him in the register's office, as administrator with the will annexed, was examined and allowed by the register, and was presented for approval to the Orphans' Court of Allegheny county, and was by that court, on March 7, 1887, approved and confirmed *nisi*, and, no exceptions thereto having been filed, the confirmation became absolute.

Thereupon, in pursuance of statutory directions, this confirmed account was put upon the audit list of the Orphans' Court for distribution of the balance shown to be in the administrator's hands, and the court fixed March 29, 1887, as the day to hear the case.

On March 28, 1887, the day before the hearing thus fixed, the bill was filed. It set forth the death of Mary McAuley; that there were two classes of claimants to the estate, to wit, the first and second cousins of the decedent; that the so-called will was null and void; and that there was a large amount of personal estate in the hands of defendant Byers, administrator, etc. The prayer was that the will and the probate be declared void and of no effect; that the administrator be enjoined from disposing of the real estate, and from collecting the rents therefrom, and that some suitable person be appointed to take charge of it until partition; that a partition of it be had and made to and among the various parties in interest, and that the defendant Byers be ordered and directed to make a full, just, and true account of all assets in his hands; that an account be taken of the testator's debts and funeral expenses, and the surplus be distributed among the plaintiff and all other parties

legally entitled thereto; and for general relief. To this bill the administrator, Byers, filed a plea, setting up the proceedings in the Orphans' Court. This plea was, after argument, overruled by the Circuit Court.

The cause was then put at issue by answer and replication. On May 20, 1888, an interlocutory decree was entered, directing that said A. M. Byers, administrator of Mary McAuley, deceased, should file an account of the personal estate before a master, who was then appointed, and the master was directed to take testimony as to the parties interested in the distribution of the balance in the hands of said administrator, and to report the testimony, with a schedule of distribution, to the court. The administrator stated before the master an account, which was identical with the account theretofore confirmed by the Orphans' Court. The master further took testimony as to who were the distributees, and reported the same to the court, with a schedule of distribution.

On January 5, 1889, a final decree was made by the Circuit Court, as follows :

"And now, to wit, January 5, 1889, this cause came on to be heard on bill, answers, replication, testimony, and the report of the master with exceptions thereto, and was argued by counsel ; whereupon, upon consideration thereof by the court, it is ordered, adjudged, and decreed that the proceeds of the sale of the real estate that was of Mary McAuley, deceased, situate on Duquesne way, in the city of Pittsburgh, after deducting expenses attending the same, shall be distributed equally between the Home for the Friendless and the Home for Aged Protestant Women."

"And it is further ordered, adjudged, and decreed that the exceptions to the master's report be overruled, and the said report confirmed, and that the personal estate of said decedent be distributed among the thirteen first cousins of said decedent, to the exclusion of her second cousins, in conformity with said master's report; and that, unless an appeal be duly entered from this decree within sixty days from this date, the administrator is ordered to transfer the

stocks and pay out the cash of said decedent's personal estate in accordance with the schedule of distribution reported by the said master, adding the sum of nine dollars and sixty-one cents (\$9.61) to the cash share of each of said thirteen distributees, to cover the duplicate credit of one hundred and twenty-five dollars (\$125) for examiner's fees inadvertently allowed in said master's report."

From this decree several appeals were taken to this court, two of which remain for consideration, to wit, the appeal of the administrator, and that of Dora McAuley and others, second cousins of the deceased, with their husbands.

D. T. Watson, for appellant Byers, administrator.

D. F. Patterson, for appellees Sarah Thompson and others.

M. P. Patterson, for appellee Pittsburgh and Allegheny Home for the Friendless.

Geo. C. Burgwin, for appellee Home for Aged Protestant Women.

S. Schoyer, Jr., Walter Lyon, and W. M. Watson, for appellants in No. 130.

Mr. Justice BREWER delivered the opinion of the court.

It is obvious from the decree which was entered that the Circuit Court of the United States assumed full control of the administration of the estate. That decree disposed of and distributed the entire estate among all the persons interested therein, citizens and non-citizens of the state. It did not stop with an adjudication of the claims of citizens of others states against the estate, but assumed to determine controversies between citizens of the same state, for the two corporations named in the first paragraph were both citizens of Pennsylvania, and yet the decree determined their rights as against the estate, as well as between themselves. Not only that, of both the first and second

cousins, between whom, as shown by the last paragraph, distribution was made, some were citizens of the state of Pennsylvania and some of other states, and yet all their claims, as between themselves and as against the estate, were disposed of by this decree.

Indeed, the decree as a whole cannot be sustained, unless upon the theory that the Federal Court had the power, on the filing of this bill, to take bodily the administration of the estate out of the hands of the State Court, and transfer it to its own forum. It was not a judgment against the estate, but a decree binding personally the administrator, and compelling him, subject to the penalties of disobedience of a decree of a Court of Chancery, to administer the estate according to the orders of the Federal, rather than those of the State, Court, which had appointed him. If we look back at the decree to the proceedings which were had in the Circuit Court intermediate the filing of the bill and the decree, it will be perceived that that court proceeded as though the entire administration of the estate had been transferred to it from the State Court. Thus, on December 3, 1887, the administrator filed in the Circuit Court a petition, commencing as follows: "The petition of A. M. Byers, administrator of all and singular the goods and chattels of Mary McAuley, late of the county of Allegheny, deceased, respectfully shows that this honorable court has taken jurisdiction of your petitioner as administrator, and of the assets of the decedent which your petitioner has in his hands," setting forth the ownership of 250 shares of railway stock, and praying for an order as to its disposal. Upon the filing of such petition the court directed that notice be given to all counsel of record, and on December 10th made an order for the disposition of the stock. So, on December 24, 1888, the administrator having filed a petition for leave to sell the real estate, the Circuit Court made an order directing the sale, "report of such sale to be made to this court for confirmation, and the proceeds to be held subject to the decree of this court." It is true that the administrator presented like applications to the State Court,

and obtained like orders, except that in the order for the sale of the real estate there was, in terms, no command to report the sale for confirmation, and hold the proceeds subject to the decree of that court. Evidently the administrator did not know which court had the power to control in these matters the actual administration of the estate; and so, for prudential reasons, applied to and obtained similar orders from both. So, both by the terms of the final decree and by the proceedings in the Circuit Court, preliminary thereto, it is clear that the question is fairly presented to us as to the power of the Circuit Court of the United States to interfere with the administration of an estate in a State Court. Such a question is of importance. No officer appointed by any court should be placed under the stress which rested upon this administrator, and compelled for his own protection to seek orders from two courts in respect to the administration of the same estate.

In order to pave the way to a clear understanding of this question, it may be well to state some general propositions which have become fully settled by the decisions of this court; and, first, it is a rule of general application that, where property is in the actual possession of one court, of competent jurisdiction, such possession cannot be disturbed by process out of another court. The doctrine has been affirmed again and again by this court. (*Hagan v. Lucas*, 10 Pet. 400; *Taylor v. Carryl*, 20 How. 583; *Peck v. Jenness*, 7 How. 612, 625; *Freeman v. Howe*, 24 How. 450; *Ellis v. Davis*, 109 U. S. 485-498; 3 Sup. Ct. Rep. 327.; *Krippendorf v. Hyde*, 110 U. S. 276; 4 Sup. Ct. Rep. 27; *Covell v. Heyman*, 111 U. S. 176; 4 Sup. Ct. Rep. 355; *Borer v. Chapman*, 119 U. S. 587, 600; 7 Sup. Ct. Rep. 342.) In *Covell v. Heyman*, *supra*, the matter was fully discussed, and in the opinion of Mr. Justice MATTHEWS, on page 179, 111 U. S., and page 356, 4 Sup. Ct. Rep., the rule is stated at length: "The point of the decision in *Freeman v. Howe*, *supra*, is that, when property is taken and held under process, *mesne* or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdic-

tion of the court from which the process has issued for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any State Court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court, but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, State or Federal, having jurisdiction over the parties and the subject-matter. And, vice versa, the same principle protects the possession of the property while thus held, by process issuing from State Courts, against any disturbance under process of the courts of the United States, excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States."

Secondly. An administrator appointed by a State Court is an officer of that court. His possession of the decedent's property is a possession taken in obedience to the orders of that court. It is the possession of the court, and it is a possession which cannot be disturbed by any other court. Upon this proposition we have direct decisions of this court. In *Williams v. Benedict* (8 How. 107, 112), it was said: "As, therefore, the judgment obtained by the plaintiffs in the court below did not entitle them to a prior lien, or a right of satisfaction in preference to the other creditors of the insolvent estate, they have no right to take in execution the property of the deceased which the Probate Court has ordered to be sold for the purpose of an equal distribution among all creditors. The jurisdiction of that court

has attached to the assets. They are *in gremio legis*. And if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction." And in *Yonley v. Lavender* (21 Wall. 276), it was held that where the statute of a state places the whole estate, real and personal, of the decedent within the custody of the Probate Court of a county, a non-resident creditor may get a judgment in the Federal Court against the resident executor or administrator, and come in under the law of the state for such payment as that law marshaling the rights of creditors awards to creditors of his class; but he cannot, because he has obtained a judgment in the Federal Court, issue execution, and take precedence of other creditors who have no right to sue in the Federal courts; and if he do issue execution, and sell the lands, the sale is void. And in the course of the opinion, on page 280, it was observed: "The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights. These laws, on the death of DuBose and the appointment of his administrator, withdrew the estate from the operation of the execution laws of the state, and placed it in the hands of a trustee for the benefit of creditors and distributees. It was thereafter, in contemplation of law, in the custody of the Probate Court of which the administrator was an officer, and during the progress of administration was not subject to seizure and sale by any one. The recovery of judgment gave no prior lien on the property, but simply fixed the status of the party, and compelled the administrator to recognize it in the payment of debts. It would be out of his power to perform the duties with which he was charged by law if the property intrusted to him by a court of competent jurisdiction could be taken from him, and appropriated to the payment of a single creditor to the injury of all others. How can he ac-

count for the assets of the estate to the court from which he derived his authority if another court can interfere and take them out of his hands?" (See, also, *Vaughan v. Northup*, 15 Pet. 1; *Peale v. Phipps*, 14 How. 367.)

There is nothing in any decision of this court controverting the proposition thus stated, that the administrator is the officer of the State Court appointing him, and that property placed in his possession by order of that court is in the custody of the court. One of the cases especially relied on by counsel for appellees is *Payne v. Hook* (7 Wall. 425). The opinion in that case was written by Mr. Justice Davis, who wrote the opinion in the case last quoted from, and in the latter opinion he said that there was nothing in *Payne v. Hook* to conflict with the views therein expressed; and, indeed, there was not. *Payne v. Hook* was the case of a bill filed by one of the distributees of an estate against the administrator and the sureties on his official bond, to obtain her distributive share in the estate of the decedent. Plaintiff was a citizen of Virginia, and the defendant a citizen of Missouri, and an administrator appointed by the Probate Court of one of its counties. Suit was brought in the Circuit Court of the United States for the district of Missouri. The charge in the bill was gross misconduct on the part of the administrator, and false settlement with the Probate Court; and that he had, by fraudulent misrepresentations, obtained a settlement with plaintiff for a sum less than she was entitled to. A demurrer to the bill was sustained in the court below, but this court held that the bill was sufficient, and that the demurrer was improperly sustained. In other words, the ruling was that plaintiff, a citizen of another state, could apply to the Federal courts to enforce her claim against an administrator arising out of his wrongful administration of the estate. To the objection that the other distributees were not made parties the court replied that it was unnecessary, that it was a proceeding alone against the administrator and his sureties. In the opinion, on page 431, it is said: "The bill under review has this object, and nothing more. It seeks

to compel the defendant, Hook, to account and pay over to Mrs. Payne her rightful share in the estate of her brother, and, in case he should not do it, to fix the liability of his sureties on his bond." There was no suggestion in the bill that the Federal Court take possession of the estate, and remove it from the custody of the administrator appointed by the State Court; no attempt to settle the claims of citizens of the state, as between themselves; no attempt to take the administration of the estate, but simply to establish and enforce, in behalf of a citizen of another state, her claim to a share of the estate. That this is the true interpretation of that case is also evident from these quotations from subsequent opinions. Thus, in *Ellis v. Davis* (109 U. S. 485, 498; 3 Sup. Ct. Rep. 327), it was said: "In *Payne v. Hook* (7 Wall. 425), it was decided that the jurisdiction of the Circuit Court of the United States in a case for equitable relief was not excluded because, by the laws of the state, the matter was within the exclusive jurisdiction of its Probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the *res* which is the subject of the litigation is entitled to administer it. (*Williams v. Benedict*, 8 How. 107; *Bank v. Horn*, 17 How. 157; *Yonley v. Lavender*, 21 Wall. 276; *Taylor v. Carryl*, 20 How. 583; *Freeman v. Howe*, 24 How. 150.)" And in *Borer v. Chapman* (119 U. S. 587, 600; 7 Sup. Ct. Rep. 342), after a quotation from the opinion in *Payne v. Hook*, it is added: "The only qualification in the application of this principle is that the courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of a court of the state." The distinction between that case and this is like that which exists between the cases of *Freeman v. Howe* (24 How. 450), and *Buck v. Colbath* (3 Wall. 334). In the former of these cases this court held that, when property was in the custody of a United States marshal, under process from a Federal Court, it could not be taken from him by any process out of a State Court; that the

possession of the marshal was the possession of the court, and no other court could disturb it; while in the latter case, it held that an action of trespass could be maintained in a State Court against a marshal of the Federal Court for goods improperly taken possession of, because such an action in no way interfered with the custody of property by the Federal Court. So here *Payne v. Hook* established that a citizen of another state could recover from an administrator the share of an estate wrongfully withheld by him, and enforce that recovery by a decree over against the sureties of the administrator's bond; while the opinion of the court below in the present case gives to the Federal Court power to take possession of property in the hands of an administrator appointed by the state court, and thus dispossess that court of its custody.

Thirdly. The jurisdiction of the Federal courts is a limited one, depending upon either the existence of a federal question or diverse citizenship of the parties. Where these elements of jurisdiction are wanting it cannot proceed, even with the consent of the parties. There is in the controversies growing out of the settlement of this estate no federal question. The jurisdiction, therefore, must depend upon diverse citizenship, and can go no further than that diverse citizenship extends. The fact that other parties may be interested in the question involved is no reason for the Federal courts taking jurisdiction of the controversy between such parties.

It is true that when the Federal Court takes property into its custody, as it does sometimes by a receiver, it may entertain jurisdiction of claims against that property in favor of citizens of the same state as the receiver, or either of the parties. But that is an ancillary jurisdiction; it is in aid of that which it has acquired by virtue of the seizure of the property, and in order, it having possession, that it may make final disposition of the property. Possession of the *res* draws to the court having possession all controversies concerning the *res*. If original jurisdiction of the administration of the estates of deceased persons were in the

Federal Court, it might, by instituting such an administration, and taking possession of the estate through an administrator appointed by it, draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person. It did not, in this case, assume to take possession of the estate in the first instance; and it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it.

Under the present law of congress, a receiver appointed by a Federal Court, and in possession of property, may be subjected to suits in the courts of the state without leave obtained in the first instance from the Federal Court. (25 Stat. 436.) Would it be tolerated for a moment that the commencement of such a suit in the State Court against a receiver enabled the State Court to draw to itself the entire administration of the receivership, and oust the Federal Court from the possession and custody of the property? The mere statement of the question carries its own answer. While the validity of a claim against the receiver may be established in the state court, the administration of the property in the hands of the receiver remaining with the Federal Court, whose officer he is; and the amount the claimant will receive from the proceeds of the property in the hands of the receiver is not settled by the State Court, which only determines the validity and extent of the demand, but rests upon the result of the administration, as ordered by the Federal Court. The fact that the Federal Court entertaining the suit of one claimant against an estate may entertain a different view of the law controlling the rights of that claimant from that entertained by the court of the state in a suit brought by a claimant, citizen of the state, holding a like character of claim, is no ground for enlarging the jurisdiction of the Federal Court beyond that given to it by the constitution of the United States.

A citizen of another state may establish a debt against

the estate, *Yonley v. Lavender* (21 Wall. 276); *Hess v. Reynolds*, (113 U. S. 73; 5 Sup. Ct. Rep. 377;) but the debt thus established must take its place and share of the estate as administered by the Probate Court, and it cannot be enforced by process directly against the property of the decedent. (*Yonley v. Lavender, supra.*) In like manner, a distributee, citizen of another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties *Payne v. Hook (supra)*, or against any other parties subject to liability *Borer v. Chapman (supra)*, or in any other way which does not disturb the possession of the property by the state court. (See the many cases heretofore cited.)

Our conclusion, therefore, is that the Federal Court erred in taking any action or making any decree looking to the mere administration of the estate, or in attempting to adjudicate the rights of citizens of the state, as between themselves. The State Court had proceeded so far as the administration of the estate carries it forward to the time when distribution may be had. In other words, the debts of the estate had been paid, and the estate was ready for distribution, but no adjudication had been made as to the distributees, and in that exigency the Circuit Court might entertain jurisdiction in favor of all citizens of other states, to determine and award their shares in the estate. Further than that it was not at liberty to go. In that determination it made two rulings, in respect to both of which we think the court was correct: First. In holding that the distributees had no interest in the real estate specially described in the first paragraph of the decree. Indeed, the ruling of the court in this respect is not seriously challenged. It is true that there is an assignment of error, in the first appeal, to the action of the court below in treating the provision in the will of Mary McAuley, that the proceeds of sale of the real estate on Duquesne way should be divided between the Home for the Friendless and the Home for Aged Protestant Women as a valid declaration of a trust, and in decreeing accordingly. But this assignment

seems to have been abandoned, or, at all events, is not contended for in the appellants' brief. We content ourselves, therefore, with saying that we see no error in the judgment of the court below in that particular. It needs no argument to show that a written instrument, though inefficacious as a will, from a want of compliance with statutory requisitions, may yet operate as a declaration of a trust. (1 Perry, Trusts § 91.)

The other ruling was that the first cousins were entitled to take the estate to the exclusion of the second cousins. In this the Circuit Court of the United States had to deal with a question of local law. The state statutes prescribed the scheme of distribution, and, if the meaning of those statutes was disputable, the construction put upon them by the state courts was binding upon the Circuit Court.

Our inquiry is, therefore, restricted to the question whether the Circuit Court correctly applied the statute law of Pennsylvania as interpreted by the courts of that state.

The Supreme Court of Pennsylvania, in *Brenneman's Appeal* (40 Pa. St. 115), construed the statute law, as it then stood, as preferring first cousins to the entire exclusion of second cousins; and this case was approved in the subsequent case of *Hayes' Appeal* (89 Pa. St. 256). Some statutory changes were made in the law, but in the recent case of *Rogers' Appeal* (131 Pa. St. 382; 18 Atl. Rep. 871), where the opposite view of the case was presented by the same counsel who represents the appellants in the present appeal, in an argument termed by that court ingenious and able, it was held that *Brenneman's Appeal* should not be overruled or even modified.

The court below, therefore, in sustaining the claim of the first, to the exclusion of the second, cousins, followed the law as construed by the State Supreme Court.

The decree of the Circuit Court must be reversed, and the case remanded, with instructions to enter a decree in favor of those citizens of other states than Pennsylvania, who have petitioned the Circuit Court for relief, and who are first cousins of the decedent, for their shares of the estate

other than the real estate described in the declaration of trust, the amount of such shares being determined by the fact that the first cousins only inherit; and an order that they recover from the administrator such sums thus found to be due. No decree will be entered in favor of the two corporations named in the first paragraph, and none in favor of the parties to the suit who are citizens of the state of Pennsylvania.

Mr. Justice SHIRAS, dissenting.

I am unable to concur in the judgment of the court, or in the reasoning used to support it.

If it be true, as is argued in the opinion, that in the case of an administration of the estate of a decedent by proceedings in the Probate Court of a state the possession of the assets by the administrator is the possession of the court, and such assets, as to custody and control, are to be deemed to be *in gremio legis*, so as to bring the case within the doctrine of *Covill v. Heyman* (111 U. S. 176; 4 Sup. Ct. Rep. 355), and kindred cases, then it would follow, as I think, that the plea of the administrator, wherein he set up the pendency of the proceedings in the Orphans' Court of the state as a bar to the bill of complaint, ought to have been sustained. Between the granting of the letters of administration and the final distribution of the fund realized by the administration there is no point of time when the jurisdiction and possession of the State Court change their character, and hence, if it be the law that the possession and control of the administrator is that of the court appointing him, within the meaning of the cases cited by the majority, there can be no point of time or stage of the proceedings between their inception and conclusion when the process of another court can be legitimately invoked to take from the State Court its power of control and decision.

In this view of the case, citizens of states other than that having possession and control of the estate through its officer, must, like the home residents, assert their claims

in the State Court ; and, if their claims have a federal character, and if the state courts should disregard that feature of their rights, the remedy would be found in an ultimate appeal to the Supreme Court of the United States.

But it is certain that such a view of this question cannot prevail without reversing a long line of decisions, of which *Payne v. Hook* (7 Wall. 425), may be cited as an early, and *Borer v. Chapman* (119 U. S. 587 ; 7 Sup. Ct. Rep. 342), as a recent, case, and in which this court has held that the jurisdiction conferred on the Federal Court by the constitution and laws of the United States extends to controversies arising in the distribution of estates of decedents, where such jurisdiction is invoked by citizens of other states than that of the domicile, notwithstanding the peculiar structure of the local probate system.

The logic of the opinion of the majority, as I understand it, seems to require a reversal of the action of the court below in overruling the administrator's plea, setting up that he was an officer of the state court, proceeding in the due and regular performance of his duties as such officer.

As, however, the opinion refrains from accepting this conclusion, though apparently rendered necessary by its own reasoning, the next questions that arise are as to those particulars in which the opinion reverses the decree of the court below.

Having conceded that the jurisdiction of the Circuit Court had duly attached under a bill in equity brought by citizens of another state, alleging legitimate matters of controversy arising out of the distribution of the decedent's estate, the opinion of the majority proceeds to consider the propriety of the action of the court below in the exercise of that jurisdiction.

The matters of controversy which formed the subject of the bill of complaint were two. The first was as to the legal effect of that provision of the will of the decedent which devised the proceeds of certain real estate, situated in the city of Pittsburgh, in equal shares to the Home of the Friendless and the Home for Aged Protestant Destitute

Women, two charitable institutions organized under the laws of the state of Pennsylvania. As the decedent left no husband, children, brothers, or sisters, but certain first cousins and second cousins, a dispute arose whether both these classes were entitled to share in the distribution of the estate, and this formed the second subject-matter of the bill.

In respect to the first matter, the court below held that, while the will of the decedent could not operate as a testamentary disposition of the real estate in question, because such will had not been executed in conformity with certain statutory requirements, yet that it constituted a valid declaration of a trust, under which the two charitable institutions were entitled to the proceeds of the real estate.

The controversy between the two classes of cousins the court resolved in favor of the first cousins, following, in so doing, the construction put upon the Pennsylvania intestate laws by the Supreme Court of that state.

This disposition by the court below of the two questions before it is approved by this court, but, in the opinion of the majority, the court below erred in including in the scope of its final decree all the parties before it, and in not restricting its decree to an adjudication of the case so far as the citizens of states other than Pennsylvania were concerned.

Be it observed, that all the parties concerned in the matters in controversy were before the Circuit Court. The administrator, the two charitable institutions, and all the individuals constituting both classes of cousins, were parties plaintiff and defendant in the suit, and none of them, either in the court below or in this court, objected to the jurisdiction of the Circuit Court, except the administrator, and his plea to the jurisdiction had been rightfully, as is admitted by the majority opinion, overruled.

In such a state of facts, why was not the action of the court fully warranted in awarding a decree finally establishing the rights of the parties before it?

There is force and logical consistency in the position that

the settlement of a decedent's estate is not a suit at law or in equity, but that such an estate constitutes a *res*, as to which the jurisdiction of the Probate Court, when it once attaches, is exclusive.

The position of the court below in exercising its jurisdiction to the extent of final determination and enforcement is likewise consistent with reason, and, as I think, with the doctrine of our previous cases.

But the conclusion of the majority in the present case, requiring the court below to shorten its arm, and to dismiss parties who were before it, assenting to its jurisdiction, is one that I cannot accept.

Let us see to what consequences such a doctrine will lead; and no better case than the one in hand is needed to illustrate its possible consequences.

The Federal Court having held that the will of the decedent was efficacious as an acknowledgement of a valid trust, of course the real estate, which formed the subject of the trust, was withdrawn from the operation of the intestate law, and was declared to be the property of the *cestuis que trustent*. From this it follows that the rest of the estate is to be equally divided among the first cousins, who are held to be entitled to it. Here we have a consistent decree that binds all the world, for all concerned were before the court, and their contentions were all heard and considered. The administrator had no official or personal concern in the questions mooted. The suggestion that he would not be protected by obeying the decree of the Circuit Court from his responsibility to the Orphans' Court, which had appointed him, has no force. If the decree of the Circuit Court were declared valid by this court, of course that decision would, involving as it does a question of the jurisdiction of the Federal courts, be obligatory upon the State Court, and a perfect protection to the administrator in carrying it into effect. There may be some foundation for criticism in the action of the court below in going behind the account that the administrator had filed in the Orphans' Court, and in subjecting him to verify his account before a

master; but, if this were error, it did not affect the final decree, inasmuch as the account of the administrator, as filed in the Orphans' Court, was approved and confirmed without change by the master.

But out of the decree recommended by the majority opinion all kinds of confusion and uncertainty may arise. The state courts may take a different view of the will of the decedent, and decline to find in it a valid declaration of a trust. In that event, the amount of the estate would be increased by the proceeds of the sale of the real estate thus added to the fund for distribution. The citizens of states other than Pennsylvania, the extent of whose rights to participate in the fund had already been determined, and, perhaps, satisfied, under the decree of the Circuit Court, could not avail themselves of such action of the State courts. Consequently the first cousins resident in Pennsylvania would receive larger shares of the estate than those received by the first cousins in other states, and thus inequality would arise.

Again, if the state courts should happen to change their views as to the proper construction of the intestate law, and hold that second cousins were entitled to participate equally with first cousins, then the second cousins who were citizens of other states would, under the decree of the Federal Court, binding upon them, receive nothing, while the second cousins living in Pennsylvania would participate. So, too, it is entirely possible, under the division of jurisdiction recommended by the majority opinion, that all of the first cousins might be citizens of other states, and second cousins only be residents of Pennsylvania. Then, as the decree of the Circuit Court gave the estate only to first cousins, and as such decree would be forthwith enforceable, it might result that, when the State Court reached an adjudication in favor of the second cousins, there would be nothing left in which they could participate. Many other absurd consequences, not far-fetched, but likely to occur, could be readily suggested, if the novel proposition of dividing jurisdiction should prevail.

I submit that the error in the reasoning of the majority opinion is found in the latent assumption that the citizens of Pennsylvania have no rights in the Federal courts in Pennsylvania. The latter are treated as if they were courts only intended for the advantage of citizens of other states. Yet we know that, admittedly, citizens of Pennsylvania have the right to resort, as parties complainant, to the Federal courts, to enforce important rights and interests, such as arise, for instance, out of the patent laws. So, too, as I understand it, when citizens of Pennsylvania have been brought into the Circuit Court of the United States as parties defendant to a suit by citizens of another state, they have a right and interest in the decree of the court in their favor. The right of the foreign citizens is not to have the Federal Court decide in their favor, but merely to have the controversy heard and determined by the Federal tribunal. The citizens of Pennsylvania who have been brought into the Federal Court have a right and interest in the decision, which, as it would have been conclusive if against them, so it must be conclusive if in their favor. The Home for the Friendless and the Home for Aged Protestant Women should not, after a decision has been made in their favor, in a suit where all concerned were parties, be turned out of the Federal Court to wage, in another tribunal, with the same parties, the same question. Nor should the second cousins, resident in Pennsylvania, after having consented to submit their claims to adjudication in the Circuit Court, be permitted, as against the same parties, to try a second fall in the State Court.

The apprehension is expressed in the opinion of the majority that the principles upon which the court below proceeded in adjudicating finally upon the parties and questions before it would lead to a conflict between the courts, Federal and State, and subject the administrator to a divided duty.

If the previous reasoning is not altogether wrong, it will be readily seen that, on the contrary, a conflict between the State and Federal courts will be brought about by an

attempt to divide between them the jurisdiction and decision of the same subjects of litigation, and that the "divided duty" which will perplex the administrator will be that of obeying two courts instead of one.

To conclude: Either the plea of the administrator, setting up the jurisdiction of the Orphans' Court, as having already attached, and as being, therefore, exclusive, ought to have been sustained, or the course of the court below, in dealing with the subjects and parties before it, by a final decree, not to be interfered with or thwarted, as between the same parties, by any other court, should be affirmed.

Jurisdiction has been defined by this court in *United States v. Arredondo* (6 Pet. 709), to be "the power to hear and determine a cause." In *Ober v. Gallagher* (93 U. S. 206), it was said that a Circuit Court "having obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief."

"*Jurisdictio est potestas de publico introducta cum necessitate jurisdictioni*," *Hall v. Stanley* (10 Coke, 73),—jurisdiction is the power introduced for the public good, with the necessity of expounding the law.

"*Juris effectus in executione consistit*," (Co. Litt. 289)—the effect of law consists in execution.

I am unable to give my adhesion to a doctrine under which, in the distribution of the estate of a decedent, parties bearing the same relation to it shall or may receive different treatment as they may happen to be citizens of one state or another in our Federal Union. The rights of all parties should be measured by the same yardstick. And when, as in the present case, all persons concerned in the distribution of an estate have been duly made parties to a suit in equity in the Circuit Court of the United States by a bill bringing into adjudication all the questions between such persons, and their several contentions have been heard and considered, the decree of such court ought to operate as a decision final between the parties and as to the matters in controversy.

I think the decree of the court below ought to be affirmed, and am authorized to say that the chief justice concurs in that conclusion and in this dissent.

Mr. Justice JACKSON, not having heard the argument, did not take part in the decision.

PAIGE *et al.* vs. BARTLETT *et al.*

[101 Alabama, 198.]

DEVASTAVIT — PLEADING — PRESENTATION OF CLAIM—MULTI-FARIOUSNESS — ADMINISTRATOR AD LITEM — DIVISION OF COUNTY — JURISDICTION.

The death of an administrator without having made a final settlement and after his removal from the state, constitutes such a breach of his bond as to make his *devastavit* an accrued claim against the estates of his sureties and to set in operation the statute of non-claim.

An allegation that the claim in suit was presented to the defendants by the filing of a bill against them by a certain person, the complainants being made parties thereto by amendment, is insufficient and a mere conclusion, unless the right or interest that person had in the claim or the cause of action set up in the bill be shown.

A bill for the settlement of an estate and to charge the representatives of some of the sureties on the administrator's bond with his *devastavit*, and also to enforce the penalty against the representatives of the other surety personally, for their failure to give the notice to creditors required by law, is multifarious.

A bill for the settlement of an estate which avers the death of one of the heirs and that her estate is entitled to whatever amount she would receive, if living, but does not make her heirs or personal representatives parties, nor aver that there is no personal representative or any heir, is demurrable for defect of parties.

Such bill does not make out a case under the statute for the appointment of an administrator *ad litem*, under Code Alabama, section 2283, making it the duty of the court to appoint such an administrator whenever it shall appear from the record in any proceeding in a court having chancery jurisdiction that the estate of a deceased person must be represented and that there is no executor or administrator, or that he is interested adversely to the estate.

The act forming a new county out of portions of two existing counties making no provision concerning the administrations of estates pending in the Probate Court of the old counties, such administrations are not affected by the formation of the new counties, and in a proper case for the transfer of such an estate into the Chancery Court it should be transferred to the Chancery Court of the original county, and the Chancery Court of the new county has no jurisdiction.

The fact that the act provides for the transfer of suits from the courts of the old counties into those of the new and makes no reference to the administration of estates is an evidence of the legislative intent that such administrations should not be removable.

APPEAL from Chancery Court, Clay county.

Bill by James H. Paige, as administrator of Martha Harris, deceased, formerly Martha Mayes, the widow of James E. Mayes, deceased, and others, heirs-at-law of said James E. Mayes, against George W. Bartlett, as executor of James L. Bunhill, deceased, and others, alleging the death of said James E. Mayes, the appointment and qualification of J. W. King, as the administrator of his estate, the receipt by the administrator of considerable assets of the estate, partial settlements by him, the last of which showed that he had then in his hands a large amount of money, that he had never made a final settlement of the accounts of his administration, and that after his removal to Arkansas, he died in that state, owing the estate a large amount of money. The defendants demurred and the complainants appeal from the decree sustaining the demurrer.

W. L. Hood, for appellants.

W. M. Lackey and *C. C. Whitson*, for appellees.

HARALSON, J.—The commission of the alleged *devastavit* by J. W. King, as administrator of J. E. Mayes' estate, as set up in the bill, would constitute such a breach of his administration bond as to make it an accrued claim against the estates of his sureties on his bond, and put into operation the running of the statute of non-claim. (*Glass v.*

Woolf's Adm'r, 82 Ala. 281; 3 South. Rep. 11; *Martin v. Ellerbe's Adm'r*, 70 Ala. 334; *Taylor v. Robinson*, 69 Ala. 269; *McDowell v. Jones*, 58 Ala. 25.)

2. The bill shows that James F. Martin, L. M. Burney, Jos. D. McCann, James L. Bunhill and Thomas Adams were the sureties of J. W. King, on his bond as administrator of the estate of said J. E. Mayes. All these sureties, as is shown, are dead, and their administrators, except the one of said Adams, are made parties defendant to the bill, sued, as stated, to require them to account for the alleged *devastavit* of said King as administrator of said Mayes. Thomas Adams, as is shown, has been dead for many years, and one William Hamilton was appointed his executor by the Probate Court of Clay county, and his estate has been finally settled in said court several years ago. The dates of the appointment of the personal representatives of these several sureties on said administration bond were as follows: Henry A. Manning was appointed administrator of J. F. Martin on the 21st of November, 1884; William T. Bishop and John H. Short, of L. M. Burney, on the 29th June, 1888; George W. Bartlett, as executor of James L. Bunhill, on the 7th of December, 1889, and Thomas Northen, as administrator of Jos. D. McCann, on the 18th of September, 1890.

In the original bill, as filed, no presentment of the claim sued on in this action was averred to have been made to the personal representatives of these several sureties. The presentment was attempted to be shown by the amendment filed to the bill. For the greater certainty, and that we may not misinterpret the averments on which complainants rely, as showing a presentation of this claim under the statute, we quote the language of the amended bill, as follows: "The complainants charge and aver that the claim for which this suit was brought was on the 8th day of February, 1890, duly and legally presented to John H. Short and W. T. Bishop, as administrators of L. M. Burney, deceased, and to George W. Bartlett, as executor of James L. Bunhill, deceased, by filing a bill in the Chancery

Court of Clay county, Ala., against them, by Mattie Paige, and on the 18th day of September, 1890, by amendment to the original bill, the other complainants presented their claim against defendants, and that complainants presented their claim to Thomas Northen, administrator of Jos. D. McCann, deceased, on the 21st day of July, 1891, by suing him in the Chancery Court of Clay county, Ala. And complainants aver that on the 25th day of September, 1891, the bill, as originally filed in said case, together with the amendments thereto, was dismissed by the court on motion of the defendants, because there was a misjoinder of parties, in that, because the only party to the original bill of complaint had been stricken out by amendment to the bill, and because of said amendment, there was an entire change of parties.

"Complainants further charge and aver that said original bill and amendments thereto were exhibited in this court by those who had a legal right to present their claim to defendants, and that upon the dismissal of their said bill, to wit, on the 25th of September, 1891, the said complainants, or their legal representatives, did on the 26th of September, 1891, file the present bill to this court, seeking to enforce the collection of their said claims.

"Orators further charge and aver that the reason their claim was not presented to James H. Short and William T. Bishop, as administrators of L. M. Burney, within eighteen months from the time they were appointed such administrators by the Probate Court of Clay county, Ala., was because the said Short and Bishop did not give notice to creditors, as required by law, to present their claims against the estate of the said L. M. Burney, deceased. And orators charge and aver that by the failure of the said Short and Bishop to give such notice to creditors the said Short and Bishop made themselves personally liable to any creditor whose claim would have been good, if presented within eighteen months from the date of their appointment. Complainants amend their bill by suing John H. Short and William T. Bishop individually, and so as to strike their

names out as originally sued as administrators of L. M. Burney."

It will be observed that the presentment of this claim is averred to have been made by the filing of two bills in the Chancery Court of Clay county,—the first on the 8th February, 1890, by Mattie Paige against John H. Short and William T. Bishop, as administrators of L. M. Burney, and George W. Bartlett, as executor of J. L. Bunhill, and by amendments thereto filed on the 18th of September, 1890, by which complainants were made parties thereto. It will also be seen that what right or interest said Mattie Paige had in and to the claim upon which the present bill is filed, or what her right of action, as set up in said bill as filed by her, was, and her right to maintain said bill, are not averred. Neither is it shown what amount she and the other complainants brought in by amendment claimed in that suit, nor any facts informing defendants of the existence and nature of the claim and of the intention of those in interest to enforce it. Substantially, all that is averred is that a claim, without describing its nature or amount, was presented in that suit, which is a mere conclusion of the pleader, not amounting to a presentation as required by statute. (*McDowell v. Jones*, 58 Ala. 25; *Smith v. Fellows*, id. 467; *Bibb v. Mitchell*, id. 657; *Floyd v. Clayton*, 67 Ala. 269; *Agnew v. Walden*, 84 Ala. 502; 4 South. Rep. 672.)

The reference to the second bill, filed on 21st July, 1891, by said Mattie Paige against Thomas Northen, as administrator, which is alleged to have been dismissed on the 25th September, 1891, is just as defective as an allegation of presentment; but that defect is cured by the further allegations that on the 26th of September, 1891, the present bill was filed against said administrator and others, which date is within the eighteen months after his appointment, and the claim is sufficiently described in the present bill.

3. The demurrer is confessed as to John H. Short and William T. Bishop, as administrators of L. M. Burney, and by amendment their names, as such, were stricken out of the bill, and added as individuals, so that the suit should

stand against them in their individual, and not in their representative, capacity. In this the bill was made multifarious. The claim against them was a personal penalty alleged to have been incurred by them, for which they are answerable at law, and which is a separate and distinct matter, having no necessary connection with the objects of this bill. (*Martin v. Ellerbe's Adm'r*, 70 Ala. 335; *Hardin v. Swoope*, 47 Ala. 273; *Clay v. Gurley*, 62 Ala. 14; *Conner v. Smith*, 74 Ala. 121.)

4. Of Sarah King it is averred that she was one of the several and only heirs-at-law of said J. E. Mayes at his death; that she died in 1884; and that her estate is interested in this suit, entitled to whatever amount she would receive, if living, out of the estate of Mayes. But neither her administrator nor her heirs-at-law are joined as complainants or defendants. The bill also fails to aver that there is no administrator or executor of her estate, or whether or not she left children. It was subject to demurrer on this account, and was not a case made out, under the statute, for the appointment of an administrator *ad litem*. (Code, § 2283; *Eretwell v. McLemore*, 52 Ala. 124; *Sullivan v. Lawler*, 72 Ala. 71.)

5. Independent of any of the foregoing principles, there remains a question which determines the fate of the present bill. The county of Clay was formed out of portions of Talladega and Randolph counties by act of the general assembly adopted December 7, 1866. (Acts 1866-67, p. 92.) The legislature, in the adoption of that act, made no provision concerning the administrations of estates pending in the Probate courts of the counties of Talladega and Randolph at or after the formation of the new county. It was its exclusive province to do so. In the absence of any such provisions, such administrations continued in the parent counties, unaffected by the formation of the new county. (*Van Hoose v. Bush*, 54 Ala. 346; *Wright v. Ware*, 50 Ala. 549; *Coltart v. Allen*, 40 Ala. 155.) The jurisdiction of the old counties in which suits were pending was not ousted in the formation of the new county, either as to the persons

or subject-matter, and this principle was as applicable to administrations pending in the Probate courts of these counties as to suits in any of their courts. (4 Amer. & Eng. Enc. Law, 355; *Lindsay v. M'Cormack*, 2 A. K. Marsh, 229; *Drake's Adm'r v. Vaughan*, 6 J. J. Marsh, 147; *Arnold v. Styles*, 2 Blackf. 391; *West's Appeal*, 5 Watts, 87.)

Mayes resided and died in Talladega county in 1862, and said King was appointed his administrator by the Probate Court of that county, in that year. If, for any allowable reason, it became necessary or proper to transfer the settlement of the administration of that estate from the Probate Court of Talladega county into a court of equity, the Chancery Court of Talladega, in whose Probate Court said administration was pending, and not the Chancery Court of Clay county, had jurisdiction, and was the one into which such settlement ought to have been removed. In the absence of legislation authorizing it, the Chancery Court of Clay had no more jurisdiction of the administration and settlement of the estate than any other Chancery Court of the state.

6. The fifth section of said act makes provision for the transfer of suits pending against defendants from the courts of the old counties into the new ones, and has no reference to the administrations pending in the Probate courts of the older counties. Indeed, this provision is to be construed as the expression of a legislative intent that such administrations were not to be removed into the Probate Court of Clay.

From what has been said it follows that the Chancery Court of Clay county has no jurisdiction of this cause, and a decree will be here entered dismissing the bill.

Dismissed.

**IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE
ACCOUNTS OF EXECUTORS, ETC., OF FREDERICK D.
HODGMAN, DECEASED.**

[140 New York, 421.]

**LEGACY—DEMONSTRATIVE OR SPECIFIC—IN LIEU OF DOWER—
TIME OF PAYMENT INTEREST — COMMISSIONS — APPEAL—
RES JUDICATA.**

A legacy of a sum of money "which may be invested" in certain stock and in bonds is a demonstrative legacy and not specific so as to entitle the legacy to dividends accruing on the stock from the testator's death to the time of payment.

A legacy in lieu of dower, to testator's widow, who is also made executrix of the will, directed to be paid as soon as convenient after his death, is not taken out of the statutory rule fixing the time of payment at the end of the year.

The acceptance of the principal in full of the legacy sixteen months after the issue of letters is a bar to a claim for interest on an accounting more than ten years later.

The acceptance by the widow who has been named executrix, but who never took any charge of the estate, of a certain sum as her "fee as executrix of said estate," precludes her from any claim for further fees as executrix.

A widow accepting a bequest "in full satisfaction and recompense of and for her dower or thirds which she may or can in any wise claim or demand" out of the estate, has no interest in legacies that become lapsed.

An executrix has no standing to appeal from the allowance of the accounts of her co-executors in respect to matters that do not affect her interests or rights in the estate.

A decree settling the accounts of an executor and allowing him credit for a legacy voluntarily paid by him, is conclusive on the liability of the estate and a bar to an action by the executor for refunding part of the legacy on a deficiency in assets.

APPEAL from Supreme Court, General Term, Third Department.

Proceedings for the settlement of the accounts of the executors and executrix of Frederick D. Hodgman, deceased. From an order of the General Term (23 N. Y. Supp. 725), modifying and affirming, as modified, a decree of the surrogate judicially settling such accounts, Mary E.

Hodgman (now Mary E. Yates), widow and executrix of said Hodgman, deceased, appeals.

Charles S. Foote, for appellant.

Edgar Hull (*C. H. Sturges*, of counsel), for respondent.

FINCH, J.—There are some questions in this case which touch the personal interest of the appellant, and upon which she has a right to our judgment. The facts upon which they arise cover but a small part of the general controversy, and are as follows: The testator, Frederick D. Hodgman, died in 1873, and after having made and executed his last will and testament, by the terms of which his widow, now Mrs. Yates, and who is the present appellant, was made executrix, and Alfred C. Hodgman, Philander C. Hitchcock, and James Cheeseman executors. Letters testamentary were issued to them on February 13, 1874, and all four qualified and entered upon the performance of their duties. Cheeseman died in 1882, and is represented in these proceedings by James H. and Olive Cheeseman, his executor and executrix. Hitchcock died in 1888, and letters testamentary under his will were issued to Asahel R. Wing. The present proceedings were commenced in 1889, and took the form of a final accounting before the surrogate of the representatives of the deceased executors, and of the surviving executrix and executor, and it is from the decree rendered on that accounting that Mrs. Yates now appeals, claiming the right to do so as executrix, as widow, and as legatee. The testator by his will, devised to his wife the property, real and personal, which constituted their home, the value of which was nearly \$11,000, and which she retained and kept as her own, without any dispute or contention, and which formed no part either of the inventory or accounts. He then gave her a further legacy, phrased thus: "I also give to my said wife the sum of \$50,000, which may be invested in bank stock, Fort Edward and Wyoming, Iowa, and in bonds." He then declared that the devise and the legacy

were to be accepted by the widow "in full satisfaction and recompense of and for her dower or thirds which she may or can in any wise claim or demand" out of his estate. Some other legacies were given, one of which was the sum of \$500 to the executors, which they were directed to invest and keep invested, and expend the interest in the care of testator's cemetery lot. A residuary clause covering all the rest of his property, carried everything remaining to his nephews and nieces, in equal shares. Outside of the home, specifically devised with its belongings, there was inventoried personal property to the amount of a little over \$96,000, and there were, in addition, several pieces of real estate. The widow received the full sum of \$50,000 on the 22d day of June, 1875, which was about one year and four months after the issue of letters testamentary, and gave a receipt for it, which reads thus: "Received from the executors of F. D. Hodgman, deceased, fifty thousand dollars, the amount of the legacy left me by the will of said Hodgman." She accepted payment in the Fort Edward bank stock at an agreed premium, in the Wyoming bank stock at par, and in cash to the amount of \$7,854.50, which made up the balance. The will specifically directed the payment to the wife thus: "I desire the legacies to my wife paid as soon after my death as convenient to my executors."

The widow now claims that certain dividends upon the bank stock collected and received by the executors belonged to her, and should be accounted for to her. That would be true if the bank stock had been specifically given to her, but not otherwise. The legacy is of the sum of \$50,000, and is merely demonstrative, and not specific. It points out the source from which payment was expected to be made, but is to be regarded as a general, and not a specific, legacy, and so the dividends accruing before payment did not belong to the legatee. (*Giddings v. Seward*, 16 N. Y. 365; *Newton v. Stanley*, 28 N. Y. 61.)

It is further claimed that, if regarded as a general legacy, it drew interest from the date of testator's death, and

such interest should have been allowed. There are exceptional cases of that character, but they are those in which the testator has not prescribed the time of payment, and we are permitted to infer an intent that it should be made earlier than the year fixed by statute. In this case the testator himself directed that it should be made as soon after his death as should be convenient to his executors, and he made his wife executrix, so that she could pay herself, or at least know when the time of payment should arrive. Nothing in the case shows that payment was unduly postponed. The widow's conduct indicates that it was not. She accepted the principal in full of the legacy without claim of interest, and as that was not given by the will, and was chargeable, if at all, only as damages for delay, her acceptance of the principal excludes the right, more than ten years later, to demand the interest. (*Cutler v. Mayor*, 92 N. Y. 166.)

She further makes a claim for commissions. There are two answers to that. One is that she was paid and accepted \$353 for her commissions, which she described as "my fee as executrix of said estate." This payment was made when it is evident that there was a general settlement out of court in progress among the parties, meant to include all interests. As she never took any charge of the estate, the allowance was liberal, and, having been approved by the surrogate and the General Term as an equitable proportion due to her, we ought not here to reconsider it in the face of her own written assent. But she further claims, as distributee, a share of certain lapsed legacies. She has no such right. It was altogether lost when she elected to take the provision which the testator made for her. That was in lieu of her dower and thirds, or, in other words, of any right as dowress or distributee "which she may or can in any wise claim or demand out of" the estate. There is not the least doubt of the meaning of the provision, and, whatever may be said about the lapsed legacies, she has no interest in them, and is entitled to no part of them. (*In re Benson*, 96 N. Y. 499.)

I do not see how the appellant is or can be affected, beyond the questions considered, by the settlement of the accounts of the other executors, as adjudicated by the surrogate's decree. If I could see in the result the faintest trace of danger to her, I should be likely to advise a reversal of this decree as manifestly wrong in many important respects. In that event we should seek to ascertain how an estate of about \$128,000, and which owed at its owner's death, so far as I can see, not to exceed \$15,000 or \$20,000, has, after paying not more than \$80,000 of legacies, become totally bankrupt and indebted to one of the executors for about \$10,000, which there are no assets to pay. We should inquire, also, why Hitchcock, after having been once credited with the Cobb trust fund of \$10,000, as delivered by him to one or more of his associates, and which was paid to the legatees by Mrs. Yates, and for which her account is credited, is a second time credited with that sum, and permitted to swell his account to that extent against the estate. We should seek to know on what principle payments made to the residuary legatees were credited to the executors, when the result reached shows that no residue remained; and we should consider whether a confused mass of items made up in total disregard of the rules for stating such accounts should be allowed to serve as a basis for deliberate judicial action. Such an inquiry might or might not change my present belief that the estate of Hodgman does not owe the estate of Hitchcock a single dollar; but I am saved its necessity by the fact that none of the parties affected by it complain of it, and that Mrs. Yates is the sole person appealing. It may be that she did her duty in calling her co-executors to account, but, when she brought into the proceeding everybody interested in the result, she ceased to be in any respect their protector or representative, and had no further duty in their behalf. When the accounts were settled, she ceased to have any interest in the decree beyond what affected her own rights, and had no authority to proceed on the appeal as the champion of those who submitted to the decree and did not ap-

peal at all. (*Bryant v. Thompson*, 128 N. Y. 426; 28 N. E. 522.)

It is suggested, however, that the unpaid debt found due from the Hodgman estate to the Hitchcock estate may compel an abatement of the appellant's legacy. I cannot see any such possible danger. The surrogate had jurisdiction, and it was his duty to make the final distribution. If for that purpose an abatement of legacies was necessary, the account should have shown it, the executor should have claimed it, and the decree should have so provided. The law does not recognize an overpayment, and does not permit the executor to credit himself with the excess, for the inquiry always is what the estate owes, and the surrogate has jurisdiction to decide that question. (*In re Underhill*, 117 N. Y. 475; 22 N. E. 1120.) His decree, therefore, is conclusive upon all the parties duly cited (Code, §§ 2742, 2743), and settles that the allowances made to the accounting party in payment of legacies and others are correct. Here the Hitchcock estate credited itself with the full legacy paid to the widow. That was an admission of a sufficiency of assets for the purpose, made when all the facts were known, and a payment which the surrogate, by its allowance to the executor, has adjudged to be correct, and therefore a debt which the estate was liable to pay in full. The decree will, as a consequence, be conclusive upon the executor in that respect. If it be granted, as probably it must be, that an executor may, at least in equity, recover an overpayment to a legatee, under peculiar circumstances which excuse his mistake, *Walker v. Hill* (17 Mass. 38+); *Lupton v. Lupton* (2 Johns. Ch. 627); *Gallego v. Attorney-General* (3 Leigh. 485, 486), yet that can never be in a case where the executor not only paid the full amount voluntarily, but on an accounting claimed credit for it as a just and proper charge against the estate, and has been credited with it as such in the final decree. It would be a strange process to allow the payment to the executor as in part the basis of his recovery against the estate, and then permit him to dispute the allowance in order to get his pay. The

Hitchcock estate is therefore bound by the decree, and can have no future action for an abatement or refunding, and the danger suggested does not exist; and that is more strongly true where the decree shows on its face that the deficiency of assets disclosed is largely, and perhaps entirely, the result of payments to residuary legatees, which must first be applied and exhausted as assets before any resort can be had to the general legacies.

We agree, therefore, with the General Term, that the executrix has no interest in the ultimate questions depending upon the correctness of the account. The judgment should be affirmed, with costs.

All concur, except GRAY and MAYNARD, JJ., dissenting.

As to when a legacy is general, specific or demonstrative, see *Kelly v. Richardson*, *supra*, p. 397 and cross reference note.

Interest on Legacy in Lieu of Dower.—A legacy to a widow in lieu of dower, no other provision for her support until the payment of the legacy being made, is excepted from the general rule that in the absence of any direction for a different time of payment, a legacy is payable one year after the death of the testator and draws interest from that time. *Williamson v. Williamson*, 6 Paige (N. Y.) 298; *Hepburn v. Hepburn*, 2 Brad. (N. Y.) 76; *Parkinson v. Parkinson*, *id.* 77; *Seymour v. Butler*, 3 *id.* 193; *Bullard v. Benson*, 1 Dem. (N. Y.) 486, 493; *Matter of Combs*, 3 *id.* 348; *Matter of Fogg*, 5 *id.* 422. Though the value of the legacy exceeds the value of the dower interest. *Matter of Fogg*, *supra*.

This exception has been based on the ground that the bequest as an equivalent for the relinquishment of a right. *Parkinson v. Parkinson*, 2 Bradf. (N. Y.) 77, 78. And also on the ground that same presumption of an intent to have it become payable immediately as in the case of a legacy for the support and maintenance of a minor child. *Pollard v. Pollard*, 83 Mass. (1 All.) 490.

But it has also been held that the fact that a legacy given in lieu of dower is of no consequence in determining the time from which it bears interest, and that such a legacy is governed by the common rule. *Church, etc. v. Ackerman's Ex'r*, 1 N. J. Eq. 40, 43; *Howard v. Francis*, 30 N. J. Eq. 444; 1 Am. Prob. Rep. 321; *Gills' Appeal*, 2 Pa. St. 231.

As to interest on legacies generally, see *State v. Crossley*, 69 Ind. 203; 1 Am. Prob. Rep. 413; *Ayer v. Ayer*, 128 Mass. 575; 1 Am. Prob. Rep. 604; *Welsh v. Brown*, 43 N. J. L. 32; 2 Am. Prob. Rep. 221; *Vermont State Baptist Convention v. Ladd*, 58 Vt. 95; 5 Am. Prob. Rep. 205; *Whitworth v. Ewing*, 15 Lea. (Tenn.) 595; 5 Am. Prob. Rep. 469; *Thorn v. Garner*, 118 N. Y. 198; 6 Am. Prob. Rep. 513.

SUCCESSION OF GAINS.

[45 Louisiana Annual, 1237.]

PROBATE—JURISDICTION—RES JUDICATA—FOREIGN PROBATE—
RIGHTS OF RESIDENTS.

Jurisdiction of the estate of a decedent is determined by the domicile without regard to the place of his death or to there being property at the time in the state, and the question of testacy or intestacy is one to be determined by the court of the domicile.

The unity of the estate is not destroyed by the fact that portions of the property may be located in different jurisdictions and from motives of public policy or the operation of local laws may be, partly or entirely, withdrawn from the control of the courts of the domicile or subjected to special restrictions.

The proper court of testator's domicile is not deprived of jurisdiction of the probate of a will by the refusal of a court of state in which it was executed, to admit it to probate, on the ground that it does not conform, as to form, to the requirements of the laws of that state, especially when the decree recognizes the right to future probate at the domicile.

Such refusal to admit the instrument to probate is not a bar to an application for the registration of a certified copy of the record of the probate at the domicile.

Nor is the pendency of an appeal from the decree a bar to such application, such appeal not operating as a stay of proceedings.

The mention of a place as that of the domicile in the reservation of the right to propound the will at that place binds no one.

The question presented for adjudication on the application for registration and recognition is not as to the effect of the provisions of the will and the rights of the parties under it, but whether or not the instrument was the last will and testament of the testator executed according to the laws of the domicile at the time of its execution and of death.

The legal rights of creditors or others in the state to contest its provisions are unaffected by such recognition and can be passed upon in proceedings to withdraw the property from the auxiliary jurisdiction.

APPEAL from Civil District Court, parish of Orleans.

William B. Davenport, who was appointed administrator of the estate of Myra Clark Gaines, deceased, by a court of the state of New York, petitioned for the registration and execution in Louisiana of an alleged will of decedent. To this petition, Hattie L. Whitney and others filed opposition, and Edmund P. Gaines and others intervened, claim-

ing to be legatees under such will. From a judgment sustaining the opposition, petitioner and interveners appeal.

Farrar, Jonas & Kruttschnitt, for William B. Davenport, appellant.

Richard De Gray and Browne & Choate, for other appellants.

Thomas J. Semmes and Rouse & Grant, for appellees.

NICHOLLS, C. J.—Mrs. Myra Clark Gaines died in the city of New Orleans on the 9th of January, 1885.

On the 12th of January of the same year, Mrs. Marie P. Evans presented for probate, to the Civil District Court for the parish of Orleans, what purported to be an olographic will of the deceased, dated, "New Orleans, January 8, 1885." On the same day what also purported to be a will of the deceased in the nuncupative form, under private signature, dated, "New Orleans, January 5, 1885," was presented for probate to the same court by W. H. Wilder and J. Y. Christmas, who were therein named as executors. They resisted the probate of the will of January 8th, on the ground that it was a forgery.

The probate of the will of January 5th was resisted by Mrs. Evans on the ground that it had been superseded by a will subsequent in date, and was defective in form.

These issues were presented and tried, resulting in a judgment rendered February 21, 1885, which decreed that the instrument purporting to be an olographic will of Mrs. Gaines, dated January 8, 1885, was fraudulent and forged, and not entitled to probate, and that the nuncupative will of January 5, 1885, was defective in form, and therefore not entitled to probate, reserving, however, the right of the executors to propound the same for probate at Washington, D. C., the domicile of the deceased.

On an appeal to this court, taken by Mrs. Evans, from that part of the judgment which declared the alleged will

of January 8th to be a forgery, the judgment of the District Court was affirmed. (38 La. Ann. 123.)

No appeal was taken from the judgment refusing to probate the will of January 5, 1885.

The judgment having become final, the District Court appointed Mrs. Mattie L. Whitney tutrix of her minor children, who were grandchildren of the deceased, and appointed James Y. Christmas tutor of his minor children, they being also grandchildren of Mrs. Gaines, and they, in their said capacities, administered the succession in Louisiana.

Subsequently, James Y. Christmas died, and, after a contest upon the administratorship, the court appointed William Wallace Whitney, who had become of age, administrator of the succession in this state. Subsequently to the refusal of the District Court to probate, as has been stated, the nuncupative will of January 5th, it was taken to the Surrogate's Court for the county of Kings, in the city of Brooklyn, state of New York, and there offered for probate by W. H. Wilder, the surviving executor named in the will.

The probate was there opposed by Mrs. Marie P. Evans, who set up the forged will of January 8, 1885. This latter instrument was again rejected, and the nuncupative will of January 5, 1885, was, by a judgment rendered June 29, 1891, decreed to have been properly executed conformably to the statutes of New York, to be genuine and valid, and to be the last will and testament of Myra Clark Gaines. It was further decreed that, at the time of the execution of said instrument, Mrs. Gaines was in all respects competent to make the same, and was not under any restraint or undue influence. The judgment further declared that William W. Whitney, Myra C. Whitney, Zuline Whitney, William W. Christmas, Rhoda B. Kennedy, and James M. Christmas, all heirs and next of kin of Mrs. Gaines, had been made parties to, and had made appearance in, the proceeding, the minor Zuline Whitney appearing through her special guardian, William H. Ford.

An appeal devolutive in character, and which is still pending in New York, was taken from this judgment by William W. Christmas and Rhoda B. Kennedy.

On the 4th August, 1892, the surrogate, declaring that a delay had been necessarily produced in granting letters testamentary or letters of administration on the estate of Mrs. Gaines, and that at the time of her death she was a resident of the county of Kings, by reason whereof the ordering and granting administration of all and singular the personal property, goods, chattels, and credits whereof she died possessed appertained to his court, appointed William B. Davenport, public administrator in Kings county, temporary administrator of all the said personal property, goods, chattels, and credits.

On the 11th December, 1892, William B. Davenport, as public administrator in Kings county, Brooklyn, N. Y., and temporary administrator of the personal property, goods, chattels, and credits of Mrs. Myra Clark Gaines, filed a petition in the District Court for the parish of Orleans, to which he annexed a certified copy of the proceedings had before the surrogate in the matter of the probate of the will of Mrs. Gaines, in which petition he alleged his appointment as above stated, and, annexing copies of his letters of appointment, he averred that under the laws of New York his powers under said appointment were the same as that of executor with seisin under the laws of Louisiana. He further alleged that Mrs. Gaines was at the time of her death, and had for many years prior thereto been, domiciled in said Kings county.

He prayed that the certified copy of the will be registered, and ordered to be executed by the court.

Opposition to this demand was filed by Hattie L. Whitney, William W. Whitney, Zuline Whitney, (now wife of — Somers), William W. Christmas, James M. Christmas and Rhoda B. Kennedy, wife of Charles U. Kennedy—the said opponents declaring themselves to be the sole heirs at law of Mrs. Gaines—and William W. Whitney, declaring himself to be, and as appearing as, administrator of the succes-

sion of Mrs. Gaines, now under administration in the Civil District Court.

The grounds of the opposition were: "(1) Because William H. Wilder had, on the 12th January, 1885, propounded said alleged will to the Civil District Court for the parish of Orleans, and prayed that the same be probated, and after due proceedings had, and evidence adduced in support thereof, it was finally ordered, adjudged, and decreed that said alleged will was not a valid will, and to it probate was refused; and it was further adjudged and decreed that said Myra Clark Gaines was, at the time of the execution of said alleged will, domiciled in the District of Columbia, and the right of proponent to apply to the proper court in said district for the probate of said will was reserved, all of which will more fully appear by the proceedings and judgment therein rendered the 27th day of February, 1885, and which judgment has not been appealed from, annulled, or vacated, and remains in full force and effect.

"(2) Because said Myra Clark Gaines did not die in the state of New York, was not domiciled therein, nor a resident thereof, at the time of her death, and had no property in said state, and said Surrogate's Court of Kings county, in said state, was without jurisdiction to admit said alleged will to probate.

"(3) Because the records of the proceedings in said Surrogate's Court, upon the petition of said Wilder for the probate of said will, show that the decree admitting said will to probate has been appealed from, which appeal is still pending; and said decree is not a final one, which authorizes this court to order the registry and execution of said will.

"(4) Because a will made in Louisiana, and rejected by its courts, can have no effect in Louisiana, although it may be admitted to probate elsewhere."

After the opposition had been filed, Edmund P. Gaines, of New York, Myra Clark Gaines Mazerat, John W. Harmon, of Mississippi, and George W. Benson, of Georgia,

all legatees under the will sought to be probated, intervened in the proceedings, praying that the balance of the funds in the hands of William Wallace Whitney, administrator, after the payment of the debts, judgments, legal charges, and such claims as are now in process of adjustment in the courts sitting in Louisiana, be ordered paid over to William B. Davenport, temporary administrator of the estate of Myra Clark Gaines in Kings county, N. Y.

The district judge, on trial of the opposition, sustained the same, and refused the application of William B. Davenport, the temporary administrator, and rejected the will.

William B. Davenport has appealed, as have the interveners, from the judgment.

The District Court considered that the will of Myra Clark Gaines, dated January 5, 1885, having been made in Louisiana, is governed by the laws of Louisiana, and, having been already decreed invalid by that court because not made in the form prescribed by law, it could not be taken to New York, the last domicile of the testator, probated there, and, having been received and made valid in New York by the laws of New York, brought back here for recognition and execution by it on property situated in this state, and in the possession of an officer of that court.

The district judge, in his opinion, says : "The will was probated in New York because the city of Brooklyn, in the county of Kings, state of New York, was considered the last domicile of the deceased. It is proved in this case to be so by her own judicial admissions made in the courts of this state, and in the Federal courts years prior to and a few months before, her death, and since her death conceded to be her domicile by her heirs and those administering her succession.

"The reservation in the judgment to propound the will at Washington, D. C., the domicile of the deceased, is mere *obiter dictum*, as the place of the domicile was not at issue in that proceeding. It is simply a reservation to propound the will for probate at the last domicile of the deceased, wheresoever that might be."

He further says: "This court has already determined that the will was not made in the form prescribed by our laws, and, therefor, under article 1595, was null and void. The fact that the deceased resided out of this state did not empower her to dispose of her property in this state in a manner different from that prescribed by the laws of this state. Article 491 of the Revised Civil Code declares that persons who reside out of the state cannot dispose of the property they possess here in a manner different from that prescribed by its laws.

"It is immaterial whether Myra Clark Gaines' domicile was here or in New York. Her will is governed by the laws of Louisiana, the law of the place where it was made, not by the law of the domicile. It having been made in Louisiana, no other law can be resorted to for the purpose of determining its validity as to form or effect, so far as its operation on property in this state is concerned.

"The domicile of a testator, as to the form and effect of a will, is ignored by our law. It is the place where it is made, and the property disposed of where situated, that is recognized. * * * The decree of the Surrogate's Court of Kings county, New York, merely declares that the will is a valid will in New York. It does not decree that it is valid everywhere. It is valid there, and, whether admitted to probate here or not, the action of this court cannot alter its effect upon property there."

In discussing the legal propositions submitted to us in this case, we hold, as established beyond question as a fact, that at the time of the making of the will of January 5, 1885, and at the time of her death, Mrs. Myra Clark Gaines' domicile was in the city of Brooklyn, New York state, and that she was only temporarily in New Orleans at that time.

The first ground of opposition submitted by the appellees was, as we have seen, that the District Court for the parish of Orleans had, on the 27th February, 1885, on the application of W. H. Wilder and James Y. Christmas to probate the will of the 5th of January, in which they were named executors, refused to do so, and reserved their right

to propound the same for probate at the city of Washington, as the place of her domicile, and that this decree, never having been appealed from, annulled, or vacated, remained still in full force and effect.

The record does not show whether this particular contention—which is substantially a plea of *res judicata*—was interposed or not, as an objection in the Surrogate's Court. Whether it was so interposed, or whether made for the first time in the last proceedings in Louisiana, it was in neither event well taken. The only question before the Civil District Court in 1885 was whether that court, should as a matter of original probate, probate the will, and that question was determined adversely to the probate, solely because it did not conform, as to form, with the requirements of the laws of this state. Neither the correctness nor the force and effect of that judgment on the issue, as so presented, are contested, nor will that judgment be affected by a decree rendered in the present proceeding. It can stand perfectly consistently with the granting of the application we are now considering.

As regards the domicile of the testator, that question was not an issue in the former proceeding, and the mention of her domicile (made in that portion of the decree reserving to the executor the right to propound the will for probate elsewhere) as being in the city of Washington was uncalled for, bound no one, and was entirely surplusage.

The second objection was to the probate of the will by the surrogate, on the ground of a want of jurisdiction in the Surrogate's Court. This want of jurisdiction, which seems to have been once urged, and then formally withdrawn, in that court, is based upon the claim that Mrs. Gaines did not die in the state of New York, was not domiciled nor a resident thereof at the time of her death, and had no property in that state. We concur in opinion, with the surrogate and the district judge, that Mrs. Gaines' domicile was in Kings county, N. Y., at the time of her death.

Her succession was instantly opened, by the fact of her

death, at the place of her domicile. That result was totally independent of her having property at that time in the county of Kings, or in the state of New York. Whether, when she died, her succession was, as to its character, a legal or a testamentary one, was a question necessarily to be determined at the place of legal opening. When the succession opened, it opened as a single and entire succession. The unity of the succession was not destroyed by the fact that portions of the property might be located in different jurisdictions and in different states, and because, from motives of public policy, or the operation of local laws, the property so situated might be withdrawn partially or entirely from the control of the laws of the state of the domicile, or subjected, for the same reasons, to special restrictions.

The language of this court in *Burbank v. Payne* (17 La. Ann. 15), that when a person dies, leaving property in two or more countries, his property in each state is considered as a separate succession for the purpose of administration, the payment of debts, and the decision of the claims of parties asserting title thereto, was never intended to convey the idea that the fictitious being or entity known as the "succession" was, from a legal standpoint, other than single and indivisible. The court was dealing, not with the succession itself, but with the effect of the laws of Louisiana upon property of that succession which chanced to be within the limits of this state.

The domicile of the deceased person being the place of the opening of the home or mother succession—the succession proper—the court of that domicile is unquestionably authorized to have presented to it an instrument purporting to be the last will and testament of the deceased, and, after due proceedings and inquiry had, to determine whether it be such last will under the laws of the place of the domicile. In the matter before us, the surrogate, in a proceeding to which the surviving executor and the legal heirs and next of kin of Mrs. Gaines were parties, had propounded before his court, for probate, the will of the 5th January, 1885,

and, after hearing, pronounced it the last will and testament of Mrs. Gaines, probated it, and ordered its execution. He did so in the clear exercise of his jurisdiction.

If a decree in Louisiana could, under any circumstances, have controlled the surrogate in his action, the particular decree relied on certainly did not do so, for it recognizes the right (if any such recognition were necessary) to a future probate at the testator's domicile, and did not attempt to close the door to subsequent action elsewhere. It expressly preserved that right.

The third objection was that the probate decree in New York could not be legally registered and acted upon here, for the reason that it was not a final decree, an appeal having been taken from the same. The appeal taken was not suspensive, and the evidence establishes that the effect of the decree, as such, was not interfered with by the appeal.

The fourth ground of opposition assigned, and which was sustained by the District Court, was "that a will made in Louisiana, and rejected by its courts, could have no effect in Louisiana, although it may be admitted to probate elsewhere."

In maintaining this ground of opposition, refusing the application, and rejecting the will, we are of the opinion the judge erred.

His error was occasioned by taking into consideration, for the purpose of reaching his conclusions, some subjects which were outside of, and foreign to, the restricted issue submitted to him.

The question before him was not whether the instrument purporting to be Mrs. Gaines' will should be probated here as a matter of original probate. That had been once attempted in his court, and failed; the court, however, properly recognizing the right of the parties in interest to propound it later for probate at the domicile. The parties in interest acted upon that suggestion. When the case went a second time before the lower court, matters had advanced very greatly beyond the point where the first judgment left them. When brought a second time before

the Civil District Court, the case was presented under entirely different conditions from those which had existed before, the object of the demand being also entirely different. In the case at bar the court was not called on to deal directly with and on the instrument as a matter still *in pais*, for the purpose of determining whether it was really the last will and testament of the deceased. That question had passed on to, and been determined by, a court competent and authorized to do so, and it was merged in the judgment of that court.

What the court was asked to do was to recognize and give effect to the judgment itself, and, as resulting from that judgment, to recognize and give effect to the adjudication made on it, that a particular instrument identified with and by the judgment was really the last will and testament of Mrs. Gaines, made and executed according to laws of the state in which she had her domicile at the time of its making and the time of her death.

What the application had in view was not to obtain a decree giving effect to the various provisions of the will, and passing upon and fixing the rights of the parties under the will, but a decree which would recognize the instrument to be Mrs. Gaines' will, and give effect to it, to the extent necessary to make it the basis of claims predicated upon it as such.

We are of the opinion that the court erred in giving to the application an intended scope greater than this, and in deciding, at this stage of the proceedings, the will and its provisions to be inoperative in this state.

That issue did not legitimately arise on the application before us, and should be left at large for the future.

If there be any parties in this state, creditors or others, who have the legal right to contest the provisions of the will, those rights would have remained unaffected by simply recognizing as a fact, what is unquestionably the fact, that the instrument in question was the will of the deceased. Whether it will be operative or not in Louisiana is a different matter. An ancillary administration of the

succession of Mrs. Gaines has been opened in this state, and an administrator has been appointed. Before property in his hands can be taken from him, proceedings contradictorily with him will have to be taken. That proceeding will furnish ample opportunities to all parties, who may have interests injuriously and illegally affected by the will, to protect them. It by no means follows that because the instrument in question discloses uncontrovertedly the last wishes and desires of the deceased, and because we so recognize, that therefore those wishes and desires are to prevail if they come in conflict with the will of the people of this state, as evidenced by statutes and decrees of its courts; but the existence of such illegal provisions must be shown in proper proceedings contradictorily with proper parties. The rights of persons claiming under the will cannot be summarily disposed of by rejecting the present application. We are of the opinion that when the surrogate of Kings county rendered a decree in proceedings contradictorily taken between W. H. Wilder, as executor of the will, and the legal heirs and next of kin of Mrs. Gaines, holding that the instrument dated January 5, 1885, and purporting to be the last will and testament, was truly and legally such, that particular fact must be taken in this state as fixed by the judgment and given effect to in Louisiana as is established.

This result of the judgment is not affected by the fact that the application in this case was made by the temporary administrator instead of the executor. The temporary administrator is legally acting in lieu of the executor.

The intervention of E. P. Gaines and others in the proceedings has no influence upon that question.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the instrument dated, "New Orleans, January 5, 1885," purporting to be the last will and testament of Myra Clark Gaines, and probated as such by the Surrogate's Court for the county of

Kings, in the state of New York, on the 24th day of June, 1891, be, and it is hereby, recognized as the last will and testament of Myra Clark Gaines; costs to be paid by appellees.

PARLANGE, J., takes no part.

DIFFERENT ADMINISTRATIONS ON SAME ESTATE.—The estate of a decedent, wherever he may reside at the time of his death, and in how many different states portions of the property may be situate, is one estate. *Equitable Life Ass. Soc. v. Vogel's Exec'r*, 76 Ala. 441, 446. Notwithstanding this unity of estate, if administration be granted in the different states where the property is located, there is not unity of administration—they are separate and independent of each other. *Aspden v. Nixon*, 45 U. S. (4 How.) 467, 497; *McLean v. Meek*, 59 U. S. (18 How.) 16; *Dent v. Ashley*, *Hemps.* 54; 7 Fed. Cas. 496; *Equitable Life Ass. Soc. v. Vogel's Exec'r*, 76 Ala. 441, 446; *McCord v. Thompson*, 92 Ind. 565, 568; *Creswell v. Slack*, 68 Iowa, 110, 113; 26 N. W. Rep. 42; *Burbank v. Payne*, 17 La. Ann. 15, 16; *Grant v. Reese*, 94 N. C. 720, 729; *Brodie v. Bickley*, 2 Rawle (Pa.) 481, 487; *King v. Clarke*, 2 Hill, Ch. (S. C.) 611, 614; *Keaton v. Campell*, 2 Hump. (Tenn.) 224. There is no privity between them. *Stacy v. Thrasher*, 47 U. S. (6 How.) 44, 59; *Hill v. Tucker*, 54 U. S. (13 How.) 458, 467; *Dent v. Ashley*, *Hemps.* 54; 7 Fed. Cas. 496; *Rosenthal v. Renick*, 44 Ill. 203, 207; *McCord v. Thompson*, 92 Ind. 565, 568; *Creswell v. Slack*, 68 Iowa, 110, 113; 26 N. W. Rep. 42; *Talmage v. Chapell*, 16 Mass. 71, 73; *Low v. Bartlett*, 90 Mass. (8 All.) 259, 263; *Ela v. Edwards*, 95 Mass. (18 All.) 48, 49; *Merrill v. New England Life Ins. Co.*, 103 Mass. 245, 249; *Taylor v. Barron*, 35 N. H. 484, 497; *Grant v. Reese*, 94 N. C. 720, 730; *King v. Clarke*, 2 Hill, Ch. (S. C.) 611, 616. Each administrator is accountable in the courts of the state of his appointment, and each administration must be settled where it was granted. *Equitable Life Ass. Soc. v. Vogel's Exec'r*, 76 Ala. 441, 446; *Boston v. Boyleston*, 2 Mass. 384; *Hooker v. Olmstead*, 23 Mass. (6 Pick.) 481, 483; *Davis v. Estey*, 25 Mass. (8 Pick.) 75, 76; *Governor v. William's*, 3 Ired. L. (N. C.) 152, 154; *Grant v. Reese*, 94 N. C. 729, 730. The right to ancillary administration arises whenever there are in states other than that of the domicile, creditors and property of the decedent. *Aspden v. Nixon*, 4 How. (U. S.) 467; *Stacy v. Thrasher*, 6 How. 44; *Stevens v. Gaylord*, 11 Mass. 256, 263; *Piquet's Appeal*, 5 Pick. 65; *Emery v. Hildreth*, 2 Gray, 228; *Low v. Bartlett*, 90 Mass. (8 All.) 259; *Penney v. McGregor*, 102 Mass. 186; *Merrill v. New England Ins. Co.*, 103 Mass. 245, 248. Even though no administration has at the time been granted at the domicile. *Stevens v. Gaylord*, 11 Mass. 256, 263; *Woods v. Matthews*, 73 Mo. 477, 482.

The administration granted at the place of his last domicile is the principal administration and the others are merely ancillary to it. *Harvey v. Richards*, 1 Mass. 381, 402; *Childress v. Bennett*, 10 Ala. 751, 752; *Harrison v. Mahorner*,

14 Ala. 829, 834; *Fretwell v. McLemore*, 52 Ala. 124, 134; *Hatchett v. Berney*, 65 Ala. 39, 46; *Corrigan v. Jones*, 14 Colo. 311; 7 Am. Prob. Rep. 582, 585; 23 Pac. Rep. 918; *Willard v. Wood*, 1 App. Cas. (D. C.) 44, 62; *McCord v. Thompson*, 92 Ind. 565, 568; *Dawes v. Boyleston*, 9 Mass. 337, 355; *Stephens v. Gaylord*, 11 Mass. 256, 263; *Dawes v. Head*, 20 Mass. (8 Pick.) 128, 141; *Fay v. Haven*, 44 Mass. (3 Met.) 109, 114; *Spradling v. Pipkin*, 15 Mo. 118, 134; *Clark v. Clement*, 35 N. H. 563. *Caulfield v. Sullivan*, 85 N. Y. 153; 2 Am. Prob. Rep. 43, 47; *Churchill v. Prescott*, 3 Brad. (N. Y.) 233, 238; *Carroll v. Hughes*, 5 Redf. (N. Y.) 337, 343; *Suarez v. Mayor*, 2 Sand. Ch. (N. Y.) 173, 177; *Ordronaux v. Helie*, 3 Sand. Ch. (N. Y.) 559, 566; *Tucker v. Condy*, 10 Rich. Eq. (S. C.) 12, 15; *Cureton v. Mills*, 13 S. C. 409, 416; *Price v. Mace*, 47 Wis. 23; 1 Am. Prob. Rep. 73; 1 N. W. Rep. 336.

Thus also, the county in which a decedent was domiciled, if a resident of the state, and not that in which his assets are situated nor that in which he dies, is the one in which jurisdiction over the estate attaches. *Estate of Harlan*, 24 Cal. 182, 189; *McBain v. Wimbish*, 27 Ga. 259; *McCampbell v. Gilbert's Adm'r*, 6 J. J. Marsh (Ky.) 592; *Bugbee v. Surrogate*, 2 Cow. (N. Y.) 471; *Monell v. Denisson*, 17 How. (N. Y.) 422, 424; *Johnson v. Corpenning*, 4 Ired. Eq. (N. C.) 216. And it is immaterial which administration is first granted. *Stevens v. Gaylord*, 11 Mass. 256, 264; *Spradling v. Pipkin*, 15 Mo. 118.

The term ancillary serves only to distinguish the one administration from the other; it does not indicate a dependence of the foreign administration on that of the domicile. *McLemore v. Fretwell*, 52 Ala. 124, 134; *Hatchett v. Berney*, 65 Ala. 39, 49. The ancillary administrator is not a mere agent of the domiciliary administrator. *Harvey v. Richards*, 1 Mason, 381; *Equitable Life Ass. Soc. v. Vogel's Adm'r*, 76 Ala. 441, 446; but the contrary language was used in *Dawes v. Head*, 20 Mass. 3 Pick. 128, 141. The domiciliary administration is, however, general and unlimited, while the ancillary administration is special and limited, in the sense that the former extends to all the personal effects of the decedent wherever situated, and all the objects contemplated by the law of testamentary disposition or distribution of the domicile are competent and proper objects to be had in view in the distribution of the estate, while the latter extends only to such personal effects of the decedent as may be found in the place where it is granted. *Cureton v. Mills*, 13 S. C. 409, 418.

In admitting a will to probate or granting administration, the court will be presumed to have based its adjudication respecting the last domicile of the decedent upon sufficient evidence. *Irwin v. Scriber*, 18 Cal. 499, 504; *Corrigan v. Jones*, 14 Colo. 311; 7 Am. Prob. Rep. 582, 584; *Woodruff v. Schultz*, 49 Iowa, 430; *Monell v. Denisson*, 17 How. (N. Y.) 422, 426; *Brown v. Gibson*, 1 Nott. & McC. (S. C.) 326. And such adjudication can be questioned by a direct or appellate proceeding only. *Corrigan v. Jones*, 14 Colo. 311; 7 Am. Prob. Rep. 582, 584. And is conclusive in another state as against those who were parties to the original proceeding. *Thomas v. Morisett*, 76 Ga. 384; 6 Am. Prob. Rep. 525. But it has also been held that such finding is not conclusive and that the question must be tried *de novo* when

a will admitted to probate in another jurisdiction is attempted to be proved as a foreign will in a state alleged to be that of the domicile of the testator. *Stark v. Parker*, 56 N. H. 481, 1 Am. Prob. Rep. 550.

As to distribution in the form of the ancillary administration, see *Succession of Gaines, infra*, and note.

As to the effect in one administration of a judgment recovered in the other, see *Braithwaite v. Harvey, infra*, and note.

FLORENCE BLYTHE, ETC., Respondent, vs. ABBIA AYRES
et al., Defendants.

[102 California, 254.]

- A party to a proceeding to determine heirship failing to except to a finding that he is not of kin of the decedent is not a party aggrieved so as to be entitled to move for a new trial or to appeal from a judgment that a certain other claimant is entitled to the estate.
- A finding as to the paternity of a child on the positive testimony of the mother as to such paternity and as to other facts, which if true, showed that she could not be mistaken and that the putative father, who had opportunity to observe her surroundings and conduct, was satisfied that he was the father of the child, will not be disturbed on appeal because of circumstances tending to show the improbability of the story.
- An illegitimate child born and domiciled in England, its mother being also domiciled in that country, is capable of being adopted and legitimated by the acts of its father in conformity with the Statutes of California, in which state he was domiciled at the time of the birth of the child and also at the time of the performance of the acts effecting the adoption and legitimation.
- A finding that in February 25, 1883, a certain person was a competent witness is sufficient as a finding that he was such competent person at the times certain letters were signed in his presence, the letters having been signed at different times between June 15, 1881 and April 8, 1883.

IN BANK. APPEAL from Superior Court, City and County of San Francisco.

Florence Blythe, a minor, by her guardian, instituted a proceeding to determine the heirship and title to the estate of Thomas H. Blythe, deceased, her claim being based on

sections 230 and 1387 respectively of the Civil Code of California : Section 230 reads as follows : "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his own family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." Section 1387 provides that "an illegitimate child is an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." Plaintiff was born in England, her mother being then at all times, until after the death of Blythe, domiciled in that country and plaintiff herself until after such death remained in England. Blythe was domiciled in California and never visited England or any European country after a time, four months before the death of plaintiff, and was never married. It was contended among other things that plaintiff not being domiciled in California at the time could not be adopted nor legitimated by any action of her putative father pursuant to the laws of that state. The Trial Court found that the real name of Blythe was Thomas H. Williams, that he had no heirs in the direct line except the plaintiffs, and that the persons known as the "Williams heirs" were next of kin to him in collateral line. On an appeal taken by the "Williams heirs" the Supreme Court sustained the judgment of the trial court both as to the adoption under section 230 and as to the legitimation under section 1387, the opinion being reported 96 Cal. 532, 31 Pac. Rep. 915.

This appeal is taken by the Blythe Company from the judgment and from an order denying a new trial.

H. S. Brown, John R. Jarboe, W. S. Goodfellow, and Edward R. Taylor, for appellant.

W. H. H. Hart, Garber, Boalt & Bishop, Thos. J. Bergin, and W. W. Foote, for respondent.

McFARLAND, J.—No. 15,411 is an appeal by the Blythe Company, a corporation, from a judgment rendered in favor of the respondent, Florence Blythe; and No. 15,528 is an appeal from an order denying a motion for a new trial in the same case. Both appeals are here considered and determined. A number of other appeals, taken by various other defendants, were argued and submitted at the time of the argument and submission of said appeals Nos. 15,411 and 15,528; and said other appeals will follow, and be determined by the conclusions arrived at in this present opinion.

The proceeding upon which these appeals arose was instituted and prosecuted to judgment by the respondent, Florence Blythe, under the provisions of section 1664 of the Code of Civil Procedure, to establish her right to the estate of Thomas H. Blythe, deceased. Nearly 200 defendants appeared claiming to be collateral kin of the said decedent, Thomas H. Blythe, and, as said kin, entitled to his estate. They were mostly associated in certain groups, as the "Williams" claimants, the "Jones" claimants, the "London Savage" claimants, the "Gipsy" claimants, etc. Their claims to heirship were mostly inconsistent with and hostile to each other; each group contending that the deceased, Thomas H. Blythe, was descended from parents different from those alleged by either of the other groups. The court found that the respondent, Florence Blythe, was the daughter and heir of the deceased. It also found that the Williams claimants were related to the deceased as alleged in their answer, and "that none of the defendants herein, other than those named and enumerated in finding number 18, was, nor is any of them, in anywise related to, or in any manner akin to, said Thomas H. Blythe, deceased." The Williams claimants appealed from the judgment, and brought up the evidence in a bill of exceptions; and their appeal has been heretofore disposed of by this court. (See *Blythe v. Ayers*, 96 Cal. 532; 31 Pac. Rep. 915.) The opinions there delivered make an extended statement of the case here unnecessary.

We do not deem it necessary to pass upon the contention of respondent that appellant's notice of appeal should have been served on all the parties to the proceeding. Neither is it necessary to pass upon the contention that, as appellant was allowed to appear in the Williams appeal, and did file an argument therein, it is bounded by the decision on that appeal. But, on these present appeals, respondent contends that the appellant, the Blythe Company, who was substituted for the Jones claimants, is not a "party aggrieved," and therefore has no standing as an appellant, because it did not except to, and does not attack, the said findings 18 and 20; and that the fact being established and unassailed that none of the defendants except the Williams claimants are "in any wise related to, or in any manner akin to, said Thomas H. Blythe, deceased," the appellant is in no position to inquire about any errors which the trial court may have committed in arriving at the conclusion that respondent is the rightful heir, and entitled to the estate. Appellant's predecessors based their right to contest for the estate upon their certain alleged kinship to the deceased; but, when it appears by an unchallenged finding that there is no such kinship, what, asks the respondent, does it matter to appellant where the estate goes, and how can it be prejudiced or aggrieved by any ruling made by the court in favor of another claimant? We confess that we can see no successful answer to this contention.

Section 1664 was clearly intended to provide the means by which, where there are hostile claimants to an estate, all the conflicting rights thereto may be summarily and finally determined in one proceeding. (*In re Burton*, 93 Cal. 461; 29 Pac. Rep. 36.) The first step in the proceeding is taken by a claimant filing a petition (not a complaint), "praying the court to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made." Thereupon the court is to make an order that notice be served on all persons "interested in said estate" to appear on a day

named, in which notice shall be set forth, among other things, "the names of all who may have appeared claiming any interest in said estate in the course of the administration of the same up to the time of the making of said order, and such other persons as the court may direct ;

* * * and requiring all persons named, or not named, having or claiming any interest in the estate of said decedent * * * to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership or interest in said estate to said court ;" and, upon proof of service of the notice, "the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate, and the title and ownership of said property." All persons desiring to appear shall, within the time limited, "file their written appearance ;" and, after the expiration of the time, the court shall enter an order adjudging the default of all persons not appearing. Within twenty days thereafter, "any of such persons so appearing" may file his complaint, "setting forth the facts constituting his claim of heirship, ownership or interest in said estate with such reasonable particularity as the court may require ;" and it must be served on the other parties appearing. "The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing the complaint, shall, in all subsequent proceedings, be treated as the plaintiff therein, and all other parties so appearing shall be treated as the defendants in said proceedings ; and all such defendants shall set forth in their respective answers the facts constituting their claim of heirship, ownership or interest in said estate with such particularity as the court may require, and serve a copy thereof on the plaintiff." It is further provided, in terms, that "the court shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant therein or thereto, and persons entitled to distribution thereof, and the final

determination of the court thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate of said deceased." It is further provided that questions which have not been determined under the provisions of said section 1664 may be raised on final distribution; "but where such questions shall have been litigated under the provisions of this section, the determination thereof as herein provided shall be conclusive in the distribution of said estate."

It will be observed that while, of the "parties appearing," the one who chooses to proceed first and file a complaint is, for convenience, to "be treated" as plaintiff, and the others as defendants, the provision as to what the pleading of each party—whether plaintiff or a defendant—is to contain is exactly the same. The plaintiff is to file a complaint "setting forth the facts constituting his claim of heirship, ownership or interest in said estate with such reasonable particularity as the court may require." And the defendants "shall set forth in their respective answers the facts constituting their claim of heirship, ownership or interest in said estate with such particularity as the court may require." It is clear, therefore, that the alleged right of each party, whether nominally a plaintiff or defendant, is as much before the court for final adjudication as is the alleged right of either of the other parties; and it is the plain duty of the court to determine the alleged claim of each party to the proceeding. No party has a standing in the Trial Court unless he has averred "his claim of heirship," etc., and has set forth the facts constituting such claim; and he would not be there heard to contest the right of another claimant, if he did not set up any right in himself. But the appellant occupies the same position in this court that it would have occupied in the court below if it had there undertaken to contest the right of respondent, or of any other claimant, without averring any right in itself. The predecessors of appellant acquired a status in the court below by averring a claim to the estate founded upon a certain alleged kinship to the deceased; but the

court having found that there was no such kinship, and that finding not being controverted, the appellant has no status here. Having no "claim of heirship, ownership or interest in the said estate," the appellant is not a "party aggrieved" within the meaning of sections 657 and 938 of the Code of Civil Procedure, and is not prejudiced by any ruling or judgment made or rendered touching the rights of respondent or of any other claimant.

The foregoing views are determinative of these two appeals against the appellant ; but, as it is claimed in one or two of the other appeals which are to be determined by this opinion that sufficient exceptions were there taken to said findings 18 and 20, we will notice some of the other points argued by counsel for the various appellants.

Very powerful arguments are made to the point that the evidence is insufficient to warrant the finding that respondent is the child of the decedent. These arguments were, no doubt, presented in all their force by the very able counsel to the learned judge of the Trial Court. The question here now is not whether the judge of that court weighed the evidence with absolute accuracy, and arrived at the only conclusion justly possible—the same conclusion to which any other judge or jury would have been forced to come. The question is, was there such a manifest conflict of material evidence on the point as threw the determination of the fact, under the established rule, entirely within the province of the trial judge ? It is needless to cite here the numerous decisions of this court to the point that we cannot disturb a finding of fact by a jury or trial judge which is the result of the consideration of evidence that is really and materially conflicting. Of course, we have in a few instances set aside a finding when, in our judgment, the apparent conflict of evidence was not substantial ; but in *Field v. Shorb* (99 Cal. 666 ; 34 Pac. Rep. 504), where we went as far in that direction as, perhaps, in any other case, we said that a finding should not be disturbed, whatever we might think of the preponderance of the evidence "where there is presented a fair, reasonable ground for a difference of

opinion, and where a conclusion either way, could not be considered as the necessary result of an unsound judgment." The point now under discussion comes within that rule. It cannot be fairly said that there was no substantial evidence upon which to rest the conclusion of the court below. We do not propose here to notice the evidence in detail. It is sufficient for the purpose in view to say that the mother of respondent testified positively that respondent is the child of the decedent, and testified to facts which, if true, show that she could not have been mistaken as to such paternity; and that the decedent, who had several months' opportunity to observe her surroundings and conduct after his first sexual relations with her, was satisfied that respondent was his child. Counsel for appellant marshal a mass of circumstances from which they argue, no doubt with a great deal of force, the improbability of the story of respondent's mother; but, after all, the argument is merely the array of improbabilities, not conclusive, against the direct statements of a living witness, who could not be mistaken as to the main facts to which she testified. Whether or not, under the circumstances, her statements should be believed, was just such a question as the law leaves with the trial judge. With him was the power, and upon him rests the responsibility.

The foregoing views also apply to the contention that there is not sufficient evidence that certain letters of the decedent were written and signed in the presence of the witness W. H. H. Hart. Hart testified to the fact; and it would be going beyond all precedent for us to hold here that he should not have been believed by the trial judge. It is to be observed, also, that the motions for new trials now pending here on appeal were denied in the lower court long after the decision of this court in *Blythe v. Ayres* had been rendered, which placed respondent's right upon section 1387, and was dependent, of course, upon the finding of the lower court on that point, based on the testimony of said Hart.

With respect to the two main propositions of law in the

case, to wit, (1) was respondent adopted by the decedent under section 230 of the Civil Code ? and (2) did decedent constitute her his heir under section 1387 of said Code ? We do not desire to add anything to what was said in the opinions delivered in *Blythe v. Ayres* (96 Cal. 532; 31 Pac. Rep. 915.) Those questions were as elaborately argued in that case as in the present appeals, and were there most carefully considered by the court. Nothing has occurred since to shake our confidence in the correctness of the decision in that case. We need not consider the elaborate arguments of counsel to the point that the complaint does not state facts sufficient to show an adoption of respondent under section 230. As to that question the justices of the court were divided in opinion at the time of the decision of *Blythe v. Ayres*, and there is still a division of opinion upon that subject. Indeed, it is doubtful whether, under the peculiar language of section 1664, strict rules of pleading apply to the proceeding instituted by that section. But all the justices qualified to act in the case agree, as all the justices acting in *Blythe v. Ayres* then agreed, that respondent is the heir of the decedent under section 1387. The only new point made as to respondent's heirship, under section 1387, is that the court did not specifically find that at the precise times when the decedent read and signed the letters acknowledging himself to be the father of respondent in the presence of W. H. H. Hart, the said Hart was a "competent witness." The letters were written in Hart's presence on June 15, 1881, October 21, 1881, May 16, 1882, and April 3, 1883; and the court did find, specifically, that intermediate those times, viz., on February 25, 1883, said Hart was a competent witness. The said W. H. H. Hart is mentioned a great many times in the record. He was a witness in the case, and an attorney of record. In each of the findings about the writing of the letters in his presence the court finds that "said W. H. H. Hart * * * was not by said Blythe called upon to witness the writing of the same, and said Hart did not attest the same as a subscribing witness thereto ; but there is no intimation that he was not a com-

petent witness. It is hardly possible to imagine a court gravely making such a finding, if Hart had not been considered a sane human being over ten years of age. If we were to order any further finding on the subject, it is evident that the finding would have to be the same as the one relating to the date of February 25, 1883, in favor of his competency. Indeed, we see no substantial merit in the point.

There is also submitted with the others, an appeal of Alice Edith from the judgment, but that appeal presents no new points.

There was also a brief filed by leave of court, on behalf of the state, claiming an escheat of the Blythe estate. But if the state could be heard at all on this appeal, to which it is not a party, its contention is covered by the foregoing views.

There are no other points presented in the briefs and arguments which call for special attention.

In the appeal No. 15,411 the judgment is affirmed, and in the appeal No. 15,528 the order denying a motion for a new trial is affirmed.

WE CONCUR: PATTERSON, J.; GAROUTTE, J.; FITZGERALD, J.; DE HAVEN, J.

As to litigation of children, see *Adams v. Adams*, *supra*, p. 1 and note.

FRANK D. HOVEY *vs.* CAROLINE NELLIS AND MARY M. BECK, AND FRANK J. LICHT *vs.* THE SAME.

[98 Michigan, 374.]

REMAINDERS—VESTED OR CONTINGENT—SALE BY GUARDIAN.

A remainder in fee limited on a previous remainder for life to the children of the previous life tenant, such life tenant not having any child at the date of the will nor at the death of the testator, vests on the birth of a child

subject to open and let in after born children; How. St. Mich., Sec. 1529, providing that future estates are vested when there is a person in being who would have an immediate right to possession on the ceasing of the precedent estate.

The intermediate life estates having been conveyed to the remainder men, and the interests of the latter, they being minors, having been sold by order of the proper court, during the lifetime of the previous life tenant, the purchasers acquired a good title subject only to be reopened to let in after born children.

Even if the remainder were merely contingent the purchasers acquired a good title subject only to the contingency by which the remainder might be defeated; How. St., Sec. 5551, providing "that expectant estates are descendible, devisable and alienable in the same manner as estates in possession."

APPEAL from Circuit Court, Wayne County; in chancery;

Two actions—one by Frank D. Hovey against Caroline Nellis and Mary M. Beck, and the other by Frank J. Licht against the same defendants—to quiet title to certain real estate. From a decree for plaintiff in each case, defendants appeal.

Gray & Gray (*W. J. Stuart*, of counsel), for appellant Caroline Nellis.

Bowen, Douglass & Whiting (*W. J. Stuart*, of counsel), for appellant Mary M. Beck.

O. E. Angstman (*Clark & Pearl*, of counsel), for appellee.

GRANT, J.—The controversies in these two suits are identical, and are governed by the same facts. In this opinion we will refer only to the case of *Hovey v. Nellis*.

The bill is filed to quiet the title to outlot No. 4 of the L. Moran farm in the city of Detroit. This farm was a narrow strip of land a few hundred feet wide, and extending back from the Detroit river about three miles. It was divided into nine lots, numbered from 1 to 9, inclusive. Lot No. 9 lay furthest from the river, and included 60.53 acres. It was subsequently subdivided into nineteen outlots, numbered from 1 to 19, inclusive. The controversy in this case relates to outlot No. 4.

Louis Moran, the owner of the entire farm, made his will in 1825, and died in 1829. He left surviving, a widow and several children. He had made certain deeds of gift to his other children, aside from his son Louis, which he recognized in his will. All his real estate not deeded to his other children he devised as follows: (1) To his wife Katherine, for life. (2) To his son Louis for life, charged with the support of one of the testator's daughters. (3) To his daughter-in-law Maria, wife of his son Louis, during widowhood. (4) "The remainder of my said real estate I give and devise to the children of my said son Louis Moran, and, if my said son Louis shall die leaving no children, then to my heirs according to law."

Complainant claims by purchase through *mesne* conveyance from the devisees of Louis Moran, Sr. The defendants claim under the will as heirs of said Louis Moran, Sr. It is conceded that the devise to Maria is void under the statute, but that it does not affect the validity of the remainder of the will.

Louis Moran, Jr., had three children,—the defendant Caroline Nellis, Octavia M. Sylvester and James L. Moran. Mrs. Sylvester died in November, 1861, leaving one child,—the defendant Mary M. Beck. James L. Moran is dead, but the date of his death is unknown. He had one child, who died in May, 1886. In 1845, Katherine Moran, the widow, and Louis Moran, Jr., and his wife, conveyed by deed all their interest in the land to the three children of Louis Moran, who were then minors. One J. B. Vallee was duly appointed their guardian. In 1847 the guardian filed a petition in the Circuit Court for the county of Wayne in chancery, praying leave to sell their real estate under the provisions of the statute. The proceedings taken thereunder were regular, and on November 16, 1849, pursuant to the decree of the court, a deed was duly executed by the guardian, conveying the land in question to John A. Damm and Joseph Grones, from whom complainant derives his title. Louis Moran, Jr., died June 20, 1869, leaving as heirs his two children,

James L. Moran and Caroline Nellis, and his grandchild Mary M. Beck. December 11, 1871, Caroline Nellis brought suit in ejectment against one Jacob Brown, who claimed under the guardian's deed, to recover possession of "the undivided half of lot 4 of the Louis Moran farm." No proceeding has ever been taken in this suit other than to file declaration, and to file proof of alleged service thereof upon Brown. By mistake the land in the deed to Damm and Grones was erroneously described as outlot 5 instead of outlot 4. It is conceded by the defendants that this was an error apparent upon the record and corrects itself.

Complainant claims that, at the time of the deed to Damm and Grones, the title of this land was vested in the children of Louis Moran, Jr., and that, the proceeding in chancery to sell being regular, Damm and Grones became vested by the deed to them of the entire title in fee simple.

He also claims that, if this be not so, still he has obtained title by exclusive and adverse possession for more than twenty years. The defendants insist that the only estate held by these children under the will at the time of the guardian's deed was a contingent remainder, and not a vested remainder, and that, while Louis Moran, Jr., lived, it was uncertain whether he would leave any children, and therefore it was uncertain to whom the property would pass. They also insist that the ejectment suit brought by defendant Nellis intercepted the running of the statute of limitations. It is further insisted, on behalf of defendant Nellis, that, the mother of defendant Mrs. Beck having died prior to the death of Louis, Jr., she (Mrs. Beck) took no interest in the reversionary estate, and that the children of Louis surviving him, and not their issue, should take. On the contrary, it is insisted, on behalf of Mrs. Beck, that she inherited the one-third which her mother would have inherited, to take effect upon the termination of the life estate.

At the date of the will, and also at the death of Louis Moran, Sr., his son Louis had no children. James L. was born in 1832, Caroline in 1838, and Octavia in 1842.

Jacob Brown purchased the land in 1867. The following year he took actual possession of the land under his deed. The proofs established an actual, hostile, open, and notorious adverse possession for more than twenty years previous to the bringing of this suit. This is sufficient to establish in him a good title, unless the ejectment suit above mentioned prevents.

1. It has been the policy of the courts to hold these estates vested at the earliest possible moment. Chancellor KENT states the rule as follows:

“No remainder will be construed to be contingent which may, consistently with the intention, be deemed vested.” (4 Kent Comm. 203; *McArthur v. Scott*, 113 U. S. 340; 5 Sup. Ct. 652.)

When Louis Moran, Sr., made his will, his son Louis had no children. He had divided the remainder of his property among his other children in anticipation of death. Manifestly, he intended that the property covered by the will should go to the issue of Louis, Jr., if he should have any. The contingency he desired to provide against was the death of his son without having had any children. It is unreasonable to say that the testator intended to cut off the direct heirs of his son Louis, should Louis' children die before he did, leaving issue. There is nothing in the provision of this will from which it can be inferred that he intended to divert the estate, in any event, from the direct heirs of the children of Louis, Jr.

Our own statute declares when estates are vested, and when contingent. (How. St. § 5529.) It reads as follows: “Future estates are either vested or contingent; they are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate; they are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain.”

Upon the birth of James L. Moran (1832), he, under this statute, was the person in being entitled to the immediate right of possession upon the ceasing of the life-estates. He

became possessed of a vested estate in remainder, subject to be reopened to let in after-born children. It was twice thus reopened.

It is provided by How. St. (§ 5551) that "expectant estates are descendible, devisable and alienable in the same manner as estates in possession."

It is the policy of the law in America not to tie up estates. Each of the children of Louis Moran, Jr., possessed an alienable estate, and the grantee of either, in the absence of limitations to the contrary, would succeed to the entire estate of the grantor, and take it subject to be reopened in the same manner as though the title had remained in the original devisee. The life-estates, by purchase, became merged in the vested estate in remainder. What interest was there then outstanding? Manifestly none. Could any portion of their title be divested and if so, how? None of it could be divested except by the birth of another child; but this would not divert the entire title of either, but would only take away so much of the title of each as would give the newly-born heir an equal interest with them. In our judgment, these conclusions are warranted by the statute above cited, and are sustained by a long list of authorities. (*Doe v. Perryn*, 3 Term Rep. 484; *McArthur v. Scott*, 113 U. S. 340; 5 Sup. Ct. 652; *Baker v. McLeod's Estate* [Wis.], 48 N.W. Rep. 657; *Wilson v. White*, 109 N. Y. 59; 15 N. E. Rep. 749; *Taggart v. Murray*, 53 N. Y. 233; *L'Etourneau v. Henquenet*, 89 Mich. 428; 50 N.W. Rep. 1077; *Fitzhugh v. Townsend*, 59 Mich. 427; 27 N.W. Rep. 561.)

2. Even if we are not correct in the conclusions above reached, still the complainant must prevail, for another reason. In *L'Etourneau v. Henquenet*, *supra*, it was expressly held that section 5551, How. St., applied to contingent estates, and that, when alienated, they are subject to the contingency by which they may be defeated. It follows that, when such estates are held by minors, they may be sold by their guardians under the direction of the Court of Chancery; otherwise, it would result that, how-

ever important and necessary it might be to sell such estates in order to provide a proper support and education for their wards, these estates would be unavailable for that purpose. Our statute is largely copied from that of New York, and under the like provisions it has there been held that such estates could be sold and conveyed under the direction of the court. (*Dodge v. Stevens*, 105 N. Y. 585; 12 N. E. Rep. 759; *Jenkins v. Fahey*, 73 N. Y. 355.) The proceedings instituted to convey such interests being regular, the guardian's deed issued in pursuance thereof conveyed the entire interests of the children to the grantee. This disposition of the case renders it unnecessary to discuss or determine the questions of laches or title by adverse possession.

Decrees affirmed, with costs.

McGRATH, C. J., did not sit. The other justices concurred.

As to the vesting of future devises to children as a class, see note to *Mosby v. Paul's Administrator*, *supra*, p. 181; *Franklin v. Franklin*, *supra*, p. 183.

As to vested and contingent interests generally, see *Halstead v. Hall*, 60 Md. 209; 3 Am. Prob. Rep. 462; *Gibbens v. Gibbens*, 140 Mass. 102; 5 Am. Prob. Rep. 92; *Ballentine v. Wood*, 42 N. J. Eq. 552; 5 Am. Prob. Rep. 244; *Weatherhead v. Stoddard*, 58 Vt. 623; 5 Am. Prob. Rep. 284; *Jones v. Jones*, 66 Wis. 310; 5 Am. Prob. Rep. 306; *Conger v. Lowe*, 124 Ind. 368; 7 Am. Prob. Rep. 139; *Larmour v. Rich*, 71 Md. 369; 7 Am. Prob. Rep. 156; *Toronto General Trusts Co. v. Chicago, Burlington & Quincy Railroad Co.*, 123 N. Y. 37; 7 Am. Prob. Rep. 294; *Bates v. Gillett*, 132 Ill. 287; 7 Am. Prob. Rep. 423.

M. J. WARREN, Respondent, vs. H. M. MCGILL, Executor,
Etc., Appellant.

[108 California, 153.]

CLAIM AGAINST ESTATE—ESTOPPEL—COMPETENCY OF WITNESS.

An affidavit to a claim made by the claimant that no payments have been made which are not credited and that there are no offsets thereto to the knowledge of claimant is sufficient under Code Civ. Proc. Cal. § 1494 requiring such affidavit as to the knowledge of "affiant."

The filing and disallowance of a claim against an estate does not estop the claimant from presenting another claim for a larger amount.

The pendency of a claim against an estate does not make the claimant incompetent as a witness as to another claim of the same kind.

Commissioners' decision. Department 2.

APPEAL from Superior Court, city and county of San Francisco.

Action by Mrs. M. J. Warren against H. M. McGill, executor of Thomas Hovenden. Defendant appeals from a judgment for plaintiff.

Henry M. McGill, for appellant.

H. C. Firebaugh, for respondent.

BELCHER, C.—Action to recover money due from an estate. The complaint avers, in substance, that Thomas Hovenden was indebted to the plaintiff in the sum of \$6,828.06, and died leaving a will, in which the defendant, McGill, was named as executor; that the will was admitted to probate, and letters testamentary were issued to defendant, who duly qualified, and entered upon the discharge of his duties as executor; that notice to creditors to present their claims was published, and thereafter within the time prescribed the claim of plaintiff, a copy of which is attached to the complaint, verified by the oath of the claimant, was duly presented to the defendant, as such executor, for allowance, and was by him rejected.

The answer denies the indebtedness, denies that the claim on which the action is founded was duly presented to defendant for allowance, and avers that no claim for the alleged indebtedness was ever presented to defendant, as such executor, "in manner or form as required by the statute of this state in such case made and provided." The case was tried by the court, and the findings were, in effect, that the plaintiff was entitled to judgment for the sum of \$4,116.65 and costs of suit, to be paid in due course of administration. Judgment was accordingly so entered, from which, and from an order denying a new trial, the defendant appeals.

1. The point that the evidence was insufficient to justify the findings cannot be sustained. Much of the evidence introduced by the plaintiff is omitted from the record, but enough is set out to support the decision. It is true there was some conflict in the evidence, and some inconsistencies were shown, but those were matters for solution by the trial court, and its action cannot be disturbed on appeal.

2. The point that the claim was not duly presented in manner or form as required by statute is rested upon the fact that the affidavit attached to the claim stated "that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said claimant;" and it is argued that the affidavit was fatally defective, because the words found in the statute (section 1494, Code Civ. Proc.), "to the knowledge of the affiant," were not used.

This point is without merit. It appears from the affidavit that the same person was "claimant" and "affiant," and the use of one word rather than the other was, therefore, wholly immaterial. See *Davis v. Browning* (91 Cal. 603; 27 Pac. Rep. 1031), where the same point was raised, and decided against the contention of appellant here.

3. The point that the plaintiff is estopped from asserting any rights under the claim sued upon is based upon the fact that, prior to its presentation, another claim, verified by her, and showing the indebtedness to be of a less amount,

was presented to defendant for allowance. No such defense is set up or suggested in the answer, and, in our opinion, it is untenable. It is true that a prior claim was made out and sent to defendant, but it was never approved by him, and, as shown by plaintiff's uncontradicted testimony, it was never read to or seen by her, and was largely incorrect. Under these circumstances the doctrine of estoppel cannot be invoked.

4. Certain errors of law are specified in the statement, but they are simply referred to in appellant's points and authorities, without any argument, and may be briefly disposed of. The first error specified is that the court erred in overruling defendant's objection to the introduction in evidence of plaintiff's account book. The objection was: "That the entries in said book were in several instances without date and unintelligible; and, further, that a mere inspection of said book shows that all the entries therein, purporting to cover a period of several months, had been written at the same time, and were evidently incorrect, and had been made at a very recent date." There is nothing in the record showing that this objection was based on any valid ground. No part of the contents of the book or of the evidence in relation to it is set out, and it must therefore be presumed that the ruling of the court was correct.

The second error specified is that the court erred in overruling defendant's objection to the competency of plaintiff's witness David Dalzell, and permitting him to testify. The objection was that the witness was incompetent because he had a suit pending against defendant of the same character as this, and "was personally interested in sustaining the alleged claim of plaintiff against defendant." There was nothing in this objection. The interest of the witness in the result did not at all effect his competency to testify. At most it could be considered only in determining what weight should be given to his testimony.

The third error specified is that the court erred in overruling defendant's motion for a non-suit. The ground of the motion was that no claim for the money sued for had

been presented, and there was no evidence to justify or sustain the demand. But the defendant expressly admitted that the claim was presented to and rejected by him, and there was, as we have seen, evidence sufficient to justify and sustain the demand. The ruling of the court was therefore without error. We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

ALONZO C. MONSON, as Executor, etc., Respondent, *vs.* THE NEW YORK SECURITY AND TRUST COMPANY, as Trustee, etc., *et al.*, Appellants, Impleaded, etc., *et al.*, Respondents.

[140 New York, 498.]

TRUST — ALLOTMENT OF SHARES — KEEPING IN SOLIDO — INCREASE.

A will giving the entire estate to the executors, in trust, to keep the estate and its proceeds invested, and, among other things, on the death of the widow, out of the residue of the estate not otherwise disposed of and the proceeds and investments thereof, to allot and set apart as many shares, each of the value and amount of \$20,000, as there should be daughters then living, or deceased leaving issue, the executors are authorized to pay these legacies in cash or by allotting securities in which the estate was invested.

The executors omitting to pay the legacies in cash or by allotting securities, the daughters are entitled to share in the increase in the value of the securities in which the estate is invested, in the proportion which their interests bore to the entire estate at the death of the widow.

The rights of the daughters to share in such increase are not affected by a decree settling the accounts of the executor and directing him to pay the trust fund to himself as trustee and keep it invested as directed by the will.

The acceptance by the daughters of interest on \$20,000, is not an acquiescence in the assumption that such interest was all they were entitled to receive, it not being shown that they knew that the securities in which the estate was invested earned more than enough to pay them that amount.

APPEAL from Supreme Court, General Term, First Department.

Action by Alonzo C. Monson, as executor, under the last will and testament of David Dunham Withers, deceased, against the New York Security and Trust Company and others, for the purpose of having the accounts of said David Dunham Withers as sole executor and trustee under the last will and testament of Reuben Withers, deceased, settled, and the rights and interests of the parties under the will determined and for a distribution of the proceeds. By the will, after certain bequests, the executors were given the rest of the estate, in trust, with power to sell the real estate and to get in all the personal estate, and to keep the estate and its proceeds safely invested, the testator adding: "My own preference being that investments made in my lifetime should be continued so long as the same, in the judgment of my executors, can be done without loss or detriment to the estate." The ninth and tenth clauses of the will are as follows:

"Ninth. Upon the death of my said wife, to allot and set apart, out of the said rest, residue, and remainder of my estate, and of the proceeds and investments thereof (exclusive of what is disposed of in the third, sixth, and seventh articles of this my will), into as many shares, each of the value and amount of twenty thousand dollars, as there shall then be survivors of my three daughters, Elizabeth Mary Center, Eupheme D. Clason, and Virginia Paine, and of the descendants of either of my said three daughters who may have previously died, leaving descendants or a descendant, and also of the descendants of my daughter Cora, whether she be then living or not — all the descendants of either deceased daughter counting but as one, however, for the purpose of such allotment—and to apply the net rents, issues, income, and profits of one of such shares or portions, to be set apart for that purpose, to the use of each of my said three daughters, Elizabeth Mary Center, Eupheme D. Clason, and Virginia Paine, who may then be living, during the natural life of such daughter, respec-

tively, free from the debts, contracts, control, or engagements of any other person, and in like manner, during the life of my daughter Cora, to apply the net rents, issues, income, and profits of one of such shares or portions to be set apart for that purpose to the use of the descendants of my daughter Cora who may be living, from time to time during her lifetime, in equal shares, *per stirpes* and not *per capita*; my said executors, in their discretion, being at liberty to make such application by paying the same over to my said daughter Cora for the use and benefit of her said descendants, but being under no obligation so to do; and if either of my said three daughters, or my said daughter Cora, shall not then be living, to divide and distribute one of such shares to the descendants or descendant of each such deceased daughter, share and share alike, *per stirpes* and not *per capita*; to have and to hold to them, respectively, their respective heirs, executors, and administrators, forever."

"Tenth. Upon the death of each of my said three daughters who shall have been living at the time of the allotment directed by the ninth article of this my will, and also upon the death of my daughter Cora, to divide and distribute the share or portion of my estate, and of the proceeds and investment thereof, of which the income is, in pursuance of the said ninth article of this will, to be applied to the use of such daughter during her life, or to the use of the descendants of my daughter Cora during her life, to and among the descendants of such daughter, if she shall leave any her surviving, share and share alike, *per stirpes* and not *per capita*; and, if such daughter shall leave no descendant surviving her, to and among the then survivors of my said three daughters, other than my daughter Cora, and the descendants of either of my daughters who may have died leaving descendants or a descendant, share and share alike, *per stirpes* and not *per capita*; to have and to hold to them, respectively, their respective heirs, executors, and administrators, forever."

The eleventh and twelfth clauses provide, in substance,

for the payment of the remainder of the estate to or for his two sons, Reuben B. and Alfred D. Withers, upon some details and with some conditions not here material.

The widow of the testator survived him until March, 1878, when she died. Alfred D. Withers is dead, leaving three children. One of the daughters is dead, leaving two sons.

The defendants, the New York Security and Trust Company, Virginia M. Paine, William Paine and Mary H. Bischoffsheim, Augustus Clason and William P. Clason, Cora De Rancourt, executrix, Florence De Wilhorst, and Cora De Wilhorst, and Richard W. Freedman as guardian *ad litem* of Sophie De Rancourt, appeal.

L. Laflin Kellogg, Delos McCurdy, and Frederic R. Couderd, for appellants.

Richard L. Hand, Edward W. Sheldon, and William G. Choate, for respondents.

PECKHAM, J., (after stating the facts.)—David Dunham Withers, the executor of his father's will, died on the 18th day of February, 1892, leaving a will, which was admitted to probate by the surrogate of New York county, and letters testamentary were issued thereon by him to the plaintiff herein on the 16th day of March, 1892. This action is brought for the purpose of having the accounts of David Dunham Withers, as executor of the will of his father, Reuben Withers, settled and allowed, and the rights and interests of all the parties interested in the estate of the father finally settled and determined, and a distribution made in accordance with such determination. From the time that David Dunham Withers qualified as executor, in 1870, the estate remained in his hands up to his death, and at that time the estate was invested in various securities; some of them standing in the name of the executor individually, some in the name of the estate of Reuben Withers, deceased, and some in the name of Reuben Withers. Since the death of the widow of Reuben Withers, in March, 1878,

the estate has largely increased in value, by the appreciation of certain of the securities in which it was invested. The investments made by Reuben Withers in his life-time were kept substantially unchanged during the life of the widow; and from her death down to the death of the executor, David Dunham Withers, the investments remained, also, about the same, with some named exceptions, which appear in the accounts of the executor. The failure of the executor, upon the death of the widow, either to pay the sum of \$20,000 in money for each of the four trust funds, or to actually and formally allot and set apart the various trust shares from the balance of the estate, together with the large appreciation in the value of some of the securities belonging to the estate, have given occasion for this controversy.

The question has arisen, substantially, between the interests of the sisters, on the one side, and those of the brothers, on the other.

On the part of the sisters, it is claimed that they should share *pro rata* in whatever rise in value there was in the securities in which the estate was invested, because, as alleged, those securities represented the trust estates belonging to them under the will of their father.

On the part of the brothers, on the contrary, it is claimed that they should be paid the whole residue of the estate, after deducting the amount of the various trust estates provided for by the terms of the will. In other words, the representatives of the brothers' interests claim that they, alone, are entitled to the whole of the estate, be it great or small, after the sisters have had their four shares, of exactly \$20,000 each.

Up to the death of the executor, in 1892, the brothers, since the death of the mother, in 1878, were paid all the income arising from the investment of the estate, after deducting a sum amounting to the legal interest on each of the four sums of \$20,000. The interest actually paid to the sisters during all this time amounted to a little over \$71,000. Taking the whole value of the estate at the death of the

widow to have been, in round numbers, \$140,000, there remained, after deducting therefrom a trust fund of \$13,000 under the third clause, and one of like amount under the sixth clause of the will, for the two brothers, respectively, and the \$80,000 trust fund for the sisters, a balance to be divided between the brothers of \$34,000; but, as the above sums of \$13,000 each were also given in trust for the sons, it is just to say that, taking them together, the \$34,000 and the \$26,000, would leave \$60,000 to be divided between them, as against \$80,000 to be divided between the sisters.

No division was, however, made, and, by reason of the appreciation in the value of the securities in which the estate remained invested, the brothers were, from time to time, paid, as income upon their interest in such estate, a total sum of a little over \$95,000, and there is now a large fund, after providing for the trust estate, awaiting distribution under the direction of the court, the whole of which is also claimed on the part of the brothers, or those representing their interests. If the securities had been sold, and a formal division of the moneys made, upon the death of the widow, the brothers, upon the assumption that the whole estate was of the above-mentioned value, would have taken in the proportion above set forth. If an actual setting apart and allotment of certain special securities had been made, such allotment would, of course, have been made according to the judgment of the executor, and no one can now say what that judgment would have dictated. But the division, segregation, and allotment once being made, the sisters would then have received all the benefits resulting to them from an appreciation of the stock which had been allotted and set apart for them. As there was no formal division of such securities, the result is claimed to be that all these benefits accrue solely to the interests owned by the brothers.

Notwithstanding the omission of the executor, who was also trustee, to formally make this separation and division, the sisters claim the right to share, proportionately to their interests in the estate as it existed at the death of the

widow, in the increase in the value of the securities in which the estate has all along been invested. This claim, in our judgment, should be allowed. We think that, by the language used in the ninth clause of the will, the testator authorized his executor either to pay the legacies for his daughters in money, to the amount of \$20,000 each, which should be thereafter invested, or to allot and set apart to them, out of the estate of the testator in his hands, securities of such estate of the value of \$20,000 for each fund. If the latter were done, the rents, issues, income, and profits would belong to the persons owning the trust estate. And we agree that, if he chose to set apart and allot securities from the estate, he could have taken any security he deemed best, up to the value stated, without being restricted to a proportionate share of all the securities. What securities he should take for the purpose of forming these trust funds, if he decided to set apart any particular ones, was matter for the judgment of the trustee alone.

The use of the words "value and amount," as contained in the ninth clause, indicates only that, if the executor were to pay the legacies in money, it should amount to the sum of \$20,000 for each of the funds, while, if he chose to set apart securities of the estate, they should be of that value for each of such trust funds. As the executor omitted to pay the legacies in money, and as he never formally set apart or allotted any of the securities of the estate for the purpose of forming the four trust funds for the sisters the question is whether that formal omission is to result as a benefit to the brothers' interests, exclusively.

The sisters' shares, by reason of the course pursued by the executor, were, in truth, all contained in, and were at all times represented by, these securities. The testator's estate consisted of such securities, and out of the testator's estate the several trust estates were to be formed. In substance, the sisters owned, as life legatees, a certain proportionate share of each security. Although the executor had the right, upon the death of the widow, to pay these trust

legacies in money, or to set apart such of the securities in which the estate was invested as in his judgment he should think best, up to the stated value, yet we think that, when he omitted to do either, he must be deemed to have made such allotment proportionately in all of the securities in which the estate was invested under the provision in the will for continuing the investments of the testator, if, in the judgment of the executor, consistent with the safety of the estate. We think the power to thus continue such investments remained until the trusts created by the testator had been accomplished, and therefore it did not terminate upon the death of the widow. As the executor kept the estate, in large part, invested in those securities even after her death, we think such action on his part can be regarded in no other light than as an investment in these securities of the different interests of those who in reality owned the estate. At any rate, the whole estate was owned by these different parties, and this whole estate was thus invested in these securities. It was not necessary, in order that each party should enjoy and have the benefit of his or her proportion of such estate, to have a formal allotment or segregation made of the shares of the estate belonging to such person. As long as the whole estate was thus kept, each party in fact owned his or her proportionate share of the income from, and the principal of, each security. It was only necessary to determine the value of the estate at the time of the death of the widow, and the sisters' interests would be in the same proportion in each security, and in the income arising therefrom, as the total of the trust funds (\$80,000) bore to the total value of the estate at the widow's death, and the balance would belong to the brothers. Convenience of administration might dictate the keeping of the estate *in solido*. It is not fatal to this view of the action of the executor to admit that he did not regard the sisters as entitled to any portion of the income, beyond the simple interest which he paid, nor any part of the increase in value of the securities, and that he therefore paid over to the brothers all the income arising

from the securities, above a sum amounting to the legal interest on the nominal amount of the trust funds.

His view of the legal rights of the sisters is not important. His action in making payments as stated is to be considered only in its bearing upon the meaning or legal effect of his keeping the estate unseparated. It is said he never intended to make any such allotment of a proportionate interest in the securities as we now assume he did in fact make, because if he had he would then have paid their proportionate share of the whole income arising from such securities. This by no means follows. He might have supposed it was proper, under the circumstances, that the whole estate should be kept invested as it was, because in his judgment the investments were good, and that in his opinion all that each sister would be entitled to, even if a formal allotment were made of a proportionate share in each security, would be the legal interest on \$20,000, the extent of the trust fund. We think that by the retention of these securities he did come to a conclusion that in his judgment they were proper investments for the whole estate. He would not have retained them, had he decided otherwise. In determining to keep the whole estate so invested, he in fact determined that the securities were proper investments for the trust estate of the sisters. In this way, and to this extent, he may be said to have invested their estates, and so permitted them to claim that he had allotted to them a proportionate share of each security in which the whole estate was invested. He failed to pay the legacies in money, and he also failed to satisfy them by an actual allotment of specific securities to the value stated by the testator; and, as he still kept the estate in one gross mass, he necessarily gave to the sisters an interest in each security to an extent proportioned to their interest in the estate which such securities represented.

There is no question in regard to the possible liability of the executor for an improper investment. It cannot arise here, although it may be said that, so far as appears, the executor discharged his duty in entire good faith, with

strict integrity, and in such a way that the contest in this case arises out of the increase in the value of the estate while in his hands. That kind of violation of duty by trustees is not very frequent, in the records which we review.

It is also urged that, in pursuing this system of keeping the whole estate undivided, the trustee was doubtless actuated by the highest solicitude for the safety and productiveness of the trust funds, and that the effect of his action was to constitute the owners of the residuum of the estate sureties, during all these years, for the maintenance of the trust fund at the full sum of \$80,000, up to the entire absorption of such residuum, while at the same time the sisters were in the receipt of an income measured by the legal rate of interest upon the full sum of \$20,000 for each sister. It is said that such a rate of interest is much more than could have otherwise been obtained from any investment which was at the same time so well secured. Whether the balance of the estate was in effect such surety, is a question which does not here arise, and need not be discussed. Counsel for the brothers allege that, if there had been losses suffered by the depreciation in value of these securities, the sisters would undoubtedly have claimed that such losses should fall wholly on the remainder of the estate, over and beyond that which was necessary to constitute the trust funds, and that these sisters would have claimed such to be their rights, because there had never been any formal allotment and setting apart of any securities, and that they would be therefore entitled to the payment of \$20,000 each before the brothers were to have anything. In the case supposed there would, of course, be a very different state of facts from those now existing. There would have been losses, instead of gains; and whether the one or the other interest should suffer the loss, or any portion of it, would have to be decided in the light of the facts as they should then appear. What might have been the result of a contention upon facts which never occurred, and under circumstances which probably would have dif-

ferred radically from those now under our observation, it is plainly useless to speculate concerning. What we now say is that in the face of these acknowledged gains to the estate, taking the language of the will, under which the executor could pay the legacies in money, or by allotting securities, the very fact that he did not pay in money, and did keep the estate invested, and without any formal allotment of particular securities in satisfaction of such legacies, gave to each sister a proportional interest in each security, and enabled them to claim and to take the proportion belonging to them of the income arising from, and of the increase in the value of, the security. By keeping the whole estate thus invested, the sisters' shares in the estate of their father were necessarily represented in these securities, and, of course, they should be entitled to the increase accruing therefrom. The judgment of the executor was thus exercised in favor of all the securities instead of in favor of any particular ones, and instead of paying the legacies in money.

But it is argued that the decree of the surrogate upon the accounting made by the executor is conclusive against this view of the case, and it is claimed that such decree is binding upon all these parties. It may be observed that the children of the daughters, Mrs. Ludlow, Mrs. Clason, and Mrs. Paine, who are entitled in remainder to these legacies, were not made parties to the accounting, and that as to them, and for the purpose of a division of the principal of the fund, there can be not the slightest foundation for the application of the principle of estoppel. We are of opinion, however, that the decree does not stand in the way of asserting the views above expressed. It was given upon an accounting by an executor, and, after making several other provisions, the decree, in effect, only provided that the executor should pay over the trust fund to himself as trustee, and invest the same as trustee, "as in said ninth clause or section of said will is directed." We do not think that this language changes, or was intended to change, the power of the executor under the will, to pay the legacies in money, or to satisfy them by setting apart securities of

their value, as allowed in the will. The language of the decree would not prevent the executor from exercising all the powers given by the will, and it was not the object of the accounting to obtain a construction of the will as to the power of the executor to invest or continue investments. The direction in question was nothing more than a formal direction to the executor to go on, and pay these four sums of \$20,000 each in the manner directed by the will.

It is a fact, however, that the moneys were not paid, even though directed by the decree; and, in the absence of such payment, we think the effect of the action of the executor in keeping the whole estate together, and invested as already stated, was not altered by the entering of the decree.

Nor do we think the receipt of interest by the sisters is an acquiescence in the correctness of the assumption that such an amount is all that they were ever entitled to. There is no finding and no evidence that they, or any of them, knew that the securities in which the estate was invested earned more than enough to pay them that amount as their proportionate share. Because, for a number of years, the brothers have received more, and the sisters less, than they were legally entitled to from these securities, is no reason why such injustice should be continued and perpetuated in the future.

No one else has been harmed by such payments as have been made to the sisters, and no one but themselves has been harmed by the excessive payments made to the brothers. The facts make out no defense of acquiescence.

In our view, the fundamental fact to be found is as to the value of the estate, and of the various securities in which it was invested, at the time of the death of the widow; and we agree in this respect with the views expressed by counsel for the plaintiff,—that the surrogate's decree does not conclusively fix that value at that time, either at \$139,530.30, or any other sum. The appraised value in the inventory, as we think, related to the appraisal as made in the inventory of the first executor, Mr. Bowdoin,

in 1867, and did not relate to the value of the various securities at the time of the widow's death. That fact must be first stated, and then there should be deducted from that sum the amount of the trust created for the benefit of the testator's son Alfred D. Withers, being \$13,000, and an equal sum should then be deducted for the benefit of the testator's other son, Reuben, and the proportion which the sum of \$20,000 bears to the total value of the estate, as thus found, and after such deductions, is the proportion which either sister would be entitled to, of the securities of the estate, upon an accounting. The same proportion would be coming to them from the income, and, upon the inquiry which is now to be made, it must be determined what amount may be now due, in order to equalize the income upon the basis herein stated.

The question which has been raised, as to which of the parties—the life legatees, or those entitled in remainder—should have the benefit of the increase in the income and principal, should be answered in favor of the life legatees. It came to them, as it seems to us, by force of the circumstances adverted to, and by reason of the language of the will and the clear intent of the testator.

As there is no question regarding the accounts of the executor in any other matter, we think the judgment appealed from should be affirmed in all things, except as to the interests of the brothers and sisters in the distribution of what remains of the estate. The counsel for the appellants stated on the argument that there was a sum in the hands of plaintiff, which, if distributed upon the basis we have above indicated, would be large enough to give to them the amounts which would be due them as principal and income, without calling upon any one else for a payment. The inquiry will therefore be confined to the distribution of the fund actually in the hands of the plaintiff. It should be distributed in accordance with the views which we have stated, and the judgment is therefore modified accordingly, and the proceedings remitted to the Supreme Court for its further action. The plaintiff and the

appellants should recover costs in this and the Supreme Court, to be paid out of the general estate. No costs to the respondents other than the plaintiff.

All concur, except BARTLETT, J., not sitting.

EMMA V. ACKERSON *et al.*, Appellants, *vs.* GEORGE F. ORCHARD and SARAH MORCHORD, Respondents.

[7 Washington, 377.]

ADMINISTRATION—JURISDICTION—SALE OF LANDS—PETITION
—NOTICE—CURATIVE ACTS.

The administration of a decedent's estate is a proceeding *in rem*, and the court acquires jurisdiction on the appointment and qualification of the administrator; Code Wash. 1881, § 1444, giving the administrator the immediate right of possession on such qualification.

Land may be ordered to be sold for the payment of the family allowance and the expenses of administration.

A supplemental statement filed by an administrator to correct a description in the inventory filed by him, stating that the land described is of the same value as the land previously appraised, need not be sworn to as an additional as required by Code Wash. 1881, § 1453, to give the Probate Court jurisdiction to order a sale of the land.

The court acquires jurisdiction to order a sale of land though four full weeks do not elapse between the date of first publication and the return day of the order to show cause, the publication having been made once a week for four weeks and the hearing being adjourned until a day after the expiration of the four weeks.

The failure of a petition for the sale of land to fully describe the land and to state the amount of personalty and how much remained undisposed of, and to show the value of the lands other than by reference to their appraised value are unavailing under Laws Wash. 1890, p. 82 (Act March 28, 1890) § 2, to disturb the title of one who purchased in good faith, if the court having jurisdiction of the estate ordered the sale, a bond, if required, having been given and approved, notice of the time and place being given as required by law and in the order, and the property being sold accordingly at public auction.

Orders for the sale of land and the sales thereunder made without petition and notice or on defective petition or notice, may be validated by act of the legislature.

SCOTT, J.—This is an action of ejectment brought by appellants to recover certain lands situate in the county of Pierce. William E. Ackerson died intestate in July, 1884, seized of the lands in controversy, and appellants claim title thereto as his heirs. The respondents, through *mesne* conveyances, claim the land by virtue of an administrator's sale made March 8, 1887. Appellants claim that the Probate Court never acquired jurisdiction to order a sale of said lands for the following reasons, and that the purported sale is void.

The record shows that one E. B. Mastick was appointed administrator April 2, 1885; and that he filed an inventory of the estate July 18th, of said year, which inventory made no mention of the lands in controversy. Subsequently, on the 7th of December, 1885, said administrator filed a supplemental statement describing said lands. Objection is made to this statement on the ground that it was not made as an additional inventory under section 1453 of the Code of 1881, in that it was not sworn to and did not show that said lands had been appraised, or state their value. It appears from said statement, however, that it was filed for the purpose of correcting a description of lands made in the original inventory, which land had been appraised, and it is stated that the lands described in said subsequent statement were of the same value as said lands previously appraised.

On September 28, 1886, said administrator petitioned the Probate Court for an order to sell the real estate in question, and an order was made of said date to show cause why the prayer of said petition should not be granted, and the court directed that said order be published at least once a week for four consecutive weeks in the Tacoma Weekly News, and that cause be shown on November 1st following. On November 1st the Probate Court adjourned the hearing of said petition to the 29th of said month, for the reason that proof of publication of the order to show cause had not been made, and on said November 29th the Probate Court heard said petition, and made an order of that date direct-

ing the administrator to sell the lands aforesaid. Objection is made to the regularity of these proceedings. It is contended that the same are void because notice had not been published as required by law. It appears from the proof filed that the first publication was had on October 8th and the last on October 29th, and consequently that four full weeks had not elapsed between the first publication of the order and the time first appointed for hearing the petition. But the full time had more than elapsed before the adjourned day upon which the petition was heard and determined.

It is further objected that said petition was insufficient because it failed to describe all the real estate of which the intestate dies seized, and because it failed to state the amount of the personal estate which had come into the administrator's hands, and how much, if any, remained undisposed of. And that it appeared from the petition that the deceased left no debts; and that it did not appear therefrom that a sale of the real estate was necessary in the course of administration. It appeared from said petition, however, that a family allowance of \$500 had been made, and the costs of administration amounted at that time to \$300. It is contended that this was not a sufficient showing to vest the court with jurisdiction to order a sale of said lands; and further, that the petition did not set forth the value of the lands that were sold, other than it contained a reference to their appraised value.

One Thomas L. Nixon was the purchaser of said lands at the administrator's sale, and the respondents subsequently purchased the same of him. The proceedings of the Probate Court in the premises appear to have been otherwise regular, and the lands were duly advertised and sold, and sale thereof subsequently regularly confirmed. While the petition was irregular and defective, in not stating some of the things that the statute requires it to state, we are of the opinion that it was sufficient to give the court jurisdiction to order a sale. The questions raised here should have been presented in that proceeding, and are insufficient to affect the title in the hands of *bona fide* purchasers.

By section 2 of the act of the legislature of March 28, 1890 (Laws 1890, p. 82), it is provided that a sale of this character shall not be avoided if it appear—

“First. That the executor, administrator or guardian was ordered to make the sale, by the Probate or Superior Court having jurisdiction of the estate; second, that he gave a bond which was approved by the probate or superior judge, in case a bond was required upon granting the order; third, that he gave notice of the time and place of sale, as in the order and by law prescribed; and, fourth, that the premises were sold accordingly, by public auction, and the sale confirmed by the court, and that they are held by one who purchased them in good faith.”

And it is not disputed but that all these things were done. And the respondents purchased the lands in good faith. Whatever force and effect the objections urged here would have been entitled to if seasonably made, we are of the opinion that they are not now available to disturb the title to these lands in the hands of the respondents. We are of the opinion that the Probate Court acquired jurisdiction of the lands, and that the matters complained of were irregularities only which did not affect the jurisdiction of the court to order the sale, and it was within the power of the court to order a sale of the lands to pay the expenses of administration and the allowance made to the family.

It is contended that the court erred in admitting certain receipts in evidence purporting to be signed by Emma V. Ackerson in her individual capacity, and as guardian of the minor Charles W. Ackerson, showing a receipt of the moneys arising from the administration of said estate and of the distribution upon the final settlement, but it is unnecessary for us to pass upon the objections thereto, because said receipts were immaterial, and enough appears in the proceedings to sustain the title of the respondents to the lands in question independent of them.

Judgment affirmed.

DUNBAR, C. J., not sitting.

SCOTT, J.—An opinion was filed in this cause on December 13th last, affirming the judgment of the lower court. A petition for rehearing having been filed, we deem it advisable to say something further in answer to the able argument therein presented.

It is contended that the order of sale made by the Probate Court was void, and that the court had no jurisdiction in the premises, in consequence of the failure to give the notice required by law of the hearing upon the petition to sell the real estate in question; and, as such order was void, that the whole proceedings relating to the sale were void for want of jurisdiction, and could not be validated by the curative act passed March 28, 1890, (section 3066, Gen. St.)

It becomes important, therefore, to inquire when and how the Probate Court acquired jurisdiction of the estate. Section 1444 of the 1881 Code provided that the administrator, upon his qualification, should have a right to the immediate possession of the estate of the deceased, both real and personal; and we are of the opinion that, upon the appointment and qualification of the administrator, the Probate Court acquired jurisdiction of the estate for the purposes of administration. It follows that the court did have jurisdiction of the estate, and its action could not be void for want of jurisdiction.

It is true, the law then provided, in relation to sales of real estate, that a petition should first be presented to obtain an order therefor, and a citation issued thereon, notifying parties interested to appear at the time set for the hearing. But could not the legislature have dispensed with this petition? It seems to us unquestionably the legislature had such power, as the court acquired jurisdiction of the estate by the appointment and qualification of the administrator, and, the administration of an estate being a proceeding *in rem*, the legislature could have provided for a sale of the lands without any petition or notice whatever. If this is true, the legislature could thereafter pass the statute in question, validating sales where no

petition had been filed, when the particular things therein specified appear.

It is therefore immaterial whether this petition in question, and the citation to appear at the hearing thereon, were void in consequence of the failure to give the prescribed notice, or for any reason. The respondents' title can safely rest on the subsequent proceedings and the curative act aforesaid, under the conceded facts in the case. Therefore, the petition for a rehearing is denied.

DUNBAR, C. J., and HOYT; STILES, and ANDERS, JJ., concur.

As to sales of land for payment of debts, see, *Shelton v. Hadlock*, 62 Conn. 148. *supra*, p. 290; *Palmerton v. Hoop*, 181 Ind. 23, *supra*, p. 223; *Hazleton v. Bogardus*, 8 Wash. 102, *infra*, p. 556; *Bateman v. Reitler*, 15 Colo. 547, *infra*, p. 598.

HELEN COSGROVE, as Administratrix, etc., Respondent, *vs.*
H. C. PITMAN *et al.*, Appellants.

[108 California, 268.]

ADMINISTRATRIX — EFFECT OF MARRIAGE — MASTER AND SERVANT — INCOMPETENCY OF FELLOW SERVANT — HABITS.

The marriage of an administratrix, though it is a ground for a proceeding for her suspension and removal, does not, of itself, deprive her of her authority or effect her right to maintain an action brought by her as administratrix.

An employer cannot be made liable for injuries to a servant resulting from the negligence of a fellow servant by evidence that the habit of the latter of using intoxicating liquors was so notorious that the employer must have known of it, without evidence that he was intoxicated at the time of the accident and that the accident resulted from his being in that state.

The impairment of the standing of the fellow servant among engineers of his class and employes of engineers by his habit of drinking and the master's knowledge of the fact, are immaterial if he was not addicted to the habit.

Occasionally taking a drink or occasionally being under the influence of liquor does not constitute such a habit of drinking as to make a person incompetent to manage an engine.

In bank. Appeal from Superior Court, city and county of San Francisco.

Action by Helen Cosgrove, as administratrix of the estate of James Cosgrove, against H. C. Pitman and another for damages for the death of her husband. Judgment for plaintiff, and defendants appeal.

Pringle, Hayne & Boyd, for appellants.

Henry E. Highton, for respondent.

HARRISON, J. — The defendants are stevedores, and in August, 1885, were engaged in discharging a cargo of coal from the vessel *Henry Hyde*, then lying at one of the wharves in San Francisco. The plaintiff's intestate was in their employ, and, while so engaged, a tub of coal, which was being hoisted from the hold of the vessel, swung around so that it might be emptied into another vessel alongside, and struck him with such force as to cause injuries from which he died. The plaintiff, as the administratrix of his estate, brought this action against the defendants to recover the damages sustained by his death, alleging that it was caused by reason of their negligence. The coal was hoisted by means of a donkey engine on the wharf, which was in charge of an engineer named Murphy, who, at signals from another employee, started and stopped the engine; and it is claimed by the plaintiff that the injury to the deceased was caused by the negligence of this engineer; and, in order to avoid the rule of law which exonerates the employer from liability to an employee for an injury resulting from the negligence of a fellow-servant, the plaintiff sought to show that Murphy was addicted to the habit of drinking intoxicating liquors, and that this fact was of such notoriety that it must have been known to the defendants, and that therefore they were guilty of negligence in having

him in their employ. The cause was tried by a jury, and a verdict rendered in favor of the plaintiff. The defendants have appealed.

Murphy's capacity as an engineer, aside from the impairment of such capacity by reason of this alleged habit, does not seem to have been questioned by the plaintiff, and there was ample evidence of such capacity shown at the trial. The plaintiff did not attempt to show that Murphy was intoxicated at the time of the accident, nor was there any evidence of that purport before the jury. Murphy himself testified, and there was no evidence tending to contradict his statement, that he was not intoxicated on the day of the accident, and had not taken any intoxicating liquors either on that day or for a year prior thereto. The testimony of Nagle that in the morning of that day, while Murphy was fixing his engine, and seemed to be in a hurry, some one remarked, "I guess he is drinking a little," is not entitled to any consideration as evidence that he had in fact been drinking.

Upon the theory of the plaintiff that the injury resulted from the negligence of Murphy, if she would charge the defendants with the results of this negligence, by reason of their having him in their employ, with knowledge of his intemperate habits, it was necessary for her to show that the injury was in some respect the result of such intemperate habits. Unless the accident was in some way connected with such habit, or resulted from intemperance, the habit was not the cause of the negligence, and the defendants could not by reason of their knowledge of this habit be rendered liable for the negligence of Murphy resulting from any other cause. If the fact of Murphy's habit of intemperance at or about the time of the accident had been shown, the jury might have inferred that he was in that condition at the time of the accident, and that his negligence was the result of this condition. Proof of his being under the influence of liquor at the time of the accident would be presumptive of his negligence, and, if it had appeared by direct evidence that he had a habit of intemper-

ance, it would throw upon the defendants the burden of showing that he was not then in that condition ; but proof that he had at some previous time the reputation of having the habit is not proof of the fact that he did have the habit. To allow the proof of his reputation for drunkenness to be equivalent to establishing the fact that he had the habit of drunkenness, and from that to make the further inference that from his habit he was so at this time, would be to draw an inference from a presumption. Unless facts are shown from which negligence may be reasonably inferred, a jury should never be permitted to infer, arbitrarily and without evidence, that there was negligence. When a fact is established, some other fact may be justly inferred therefrom, but when the plaintiff, instead of presenting a fact or facts from which the negligence of the defendant may be reasonably inferred, gives to the jury only a presumption drawn from other facts, the jury are not to be allowed to infer negligence from such presumption. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. (See *Douglass v. Mitchell's Ex'r*, 35 Pa. St. 443.)

For the purpose of establishing this habit in Murphy, the plaintiff offered evidence of his reputation in the matter of drinking, and also the testimony of certain witnesses that they had at times seen him "under the influence" of liquor. None of the witnesses testified that they had ever seen him intoxicated, or that he was in fact accustomed to habitual drinking. It was shown that he would occasionally drink, "to be sociable and pleasant," and also that it was quite common for engineers to drink. One witness, when asked about his habits with respect to drink prior to the day of the accident, said: "I have seen him take a drink once in a while. I have seen him when he was pretty full." And when asked how frequently said: "Well, not very often. It might be once a week, or something like that." Another witness, when asked with reference to his habits of drink, said that "for some months prior to 1885" he would take a drink frequently, and that quite a number of times he had

known of his drinking to excess; that for four, five or six years before the trial (March, 1891) he had not conducted himself so well with respect to drink, and a great many would not employ him. The witness did not, however, state when or how frequently he had known of his drinking to excess. Another of the plaintiff's witnesses testified that the "standing" of Murphy "along about 1885" was bad, on account of drinking, and that among the pile drivers for four or five years prior to the trial he was not thought to be a "safe" man. Another, who had seen him drink in 1883, said that since that time "I have considered that he drank too much whisky to take care of an engine." He does not, however, state that he had had any knowledge of Murphy's habits or conduct for two years prior to the accident. This was substantially all the evidence that was given by the plaintiff for the purpose of showing that Murphy was addicted to the habit of drinking. When the evidence was offered, the defendants reserved the right to move to strike it out, if the plaintiff failed to bring it home to them, or should fail to show that Murphy was under the influence of liquor at the time of the accident; and at the close of the plaintiff's case they made this motion, and it was denied by the court.

This motion should have been granted. It cannot be said that to take an occasional social drink, or even to be occasionally under the influence of drink, constitutes a habit of drinking, or that a jury would be authorized to infer from such evidence that the man had been rendered incapable of properly managing his engine, when he had not been drinking for a year prior thereto. Proof of specific acts is not equivalent to proof that Murphy had either this reputation or the habit. "Character for care, skill, and truth of witnesses, parties or others, must all alike be proved by evidence of general reputation, and not of special acts. (1 Greenl. Ev. §§ 461-469.) Character grows out of special acts, but is not proved by them, though, indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established, and

sometimes the very frailties that are proved against a man may have been regarded by him in so serious a light as to have produced a great improvement of character." (*Frazier v. Railroad Co.*, 38 Pa. St. 110.) The instruction of the court upon this proposition, given at the request of the plaintiff—that "if an engineer should be proved skillful and competent to run a dummy engine by reason of his intelligence, skill, and experience, and yet should be unsteady and unreliable on account of a habit of drinking intoxicating liquors to excess, he would not be a competent engineer, within the meaning of the law"—should not have been given. There was no evidence before the jury from which they were authorized to find that Murphy had the habit of drinking intoxicating liquors to excess, or that he was unsteady or unreliable at the time of the accident.

While proof that Murphy had a general reputation for drunkenness might be held to impute to the defendants knowledge of such reputation, and, consequently, impose upon them the necessity of making inquiry with reference to the fact, and charge them with the consequences of not doing so, yet such proof would not establish the fact that he was in reality so addicted, and it might be that the inquiry by the defendants, after being informed of the reputation, would show that the reputation was without foundation; otherwise, the defendants would be charged with the consequences of a trait that never existed. Upon this proposition the court instructed the jury as follows: "If you believe from the evidence that, under the law as explained to you by the court, James Cosgrove was injured without contributory negligence on his own part, through the negligence of the engineer, James Murphy, and that the said James Murphy was a man whose habits of drinking had impaired his standing among engineers of his class, and among the employers of such engineers, and was not a safe man to be employed to run a dummy engine in connection with stevedoring work in discharging ships, and that the defendants knew, or by reasonable inquiry might have known, these facts, and that, nevertheless, they em-

ployed him on August 25, 1885, to run the engine in discharging coal from the Henry Hyde, and that said James Cosgrove did not know, and had no means of knowing, of the engineer's drunkenness and unfitness, then your verdict should be for the plaintiff." This instruction should not have been given. Aside from the statement implied therein that the drunkenness and unfitness of Murphy was a fact in the case, the "standing" of Murphy among engineers or employers was an immaterial element in determining his capacity or negligence. It was relevant only for the purpose of putting the defendants upon notice that such was his reputation, and that they were bound by the consequences, if the reputation was founded upon fact. The knowledge by the defendants of Murphy's standing among engineers did not charge them with any negligence, if he did not in reality have the habit of drinking, and, as we have seen above, there was no evidence before the jury of any drunkenness of Murphy at the time of the accident, or from which they could draw the inference that at that time he had a habit of drinking.

It appeared at the trial that the plaintiff was the wife of the deceased, and that after the commencement of the action, and before the trial, she had remarried. The defendants objected that by her remarriage her authority as administratrix was extinguished, and she could no longer maintain the action. It has been held, however, that the marriage of an executrix does not *eo instanti*, deprive her of her power to act, but is merely ground for a proceeding for her suspension and removal. (*Schroeder v. Superior Court*, 70 Cal. 343; 11 Pac. Rep. 651; *McMillan v. Hayward*, 94 Cal. 357; 29 Pac. Rep. 774.) The same principles apply in the case of an administratrix as an executrix, and there was therefore no error in this ruling of the court.

As the case is to be remanded for a new trial, we do not deem it proper to indicate any opinion concerning the weight of evidence upon the issues of negligence or contributory negligence. The judgment and order are reversed.

McFARLAND, J. I concur.

FITZGERALD, J. I concur in the judgment.

GAROUTTE, J. It is claimed that the accident occurred by reason of the negligence of the engineer, a servant of the defendants and a fellow servant with the deceased. To support plaintiff's case under this state of facts, it was not only necessary to prove that the engineer was intoxicated at the time of the accident, but that defendants were guilty of negligence in employing him. It was proven that his general reputation for sobriety was bad, and it may be conceded, for the purposes of this case, at least, that defendants were lacking in the exercise of due and proper care in hiring such a man. But there is no evidence in the record that he was intoxicated at the time of the accident, and nothing therein from which we are justified in drawing an inference to that effect. I concur in the judgment.

DE HAVEN, J. I concur in the opinion of Mr. Justice GAROUTTE.

As to the effect of the re-marriage of an administratrix, see *Hamilton v. Levy*, 41 s. c. 375, 388; 19 S. E. Rep. 610.

SUCCESSION OF MYRA CLARK GAINES.

[46 Louisiana Annual, 252.]

ANCILLARY ADMINISTRATION—DISTRIBUTION OF ASSETS.

The assets of a non-resident decedent should be transmitted to the representative appointed by the court of the domicile, whenever the rights of citizens are not injuriously affected.

The power of the courts to order such transmission is undoubted and is a consequence of the comity of states and friendly nations.

The exercise of this power is a matter of discretion depending on the circumstances of the particular case.

The only surviving executor named in the will of a non-resident being a resident of the State of Louisiana, the creditors of the estate, and the legatees under the will being before the court and asking to be paid in that state, the fund in the hand of the administrator there appointed will be ordered to be distributed there.

APPEAL from Civil District Court, parish of Orleans.

Petition in opposition by William B. Davenport, temporary administrator in the state of New York of Myra Clark Gaines, deceased, and others, to recover surplus assets in the hands of decedent's Louisiana administrator. From the judgment rendered, opponents appeal.

Browne & Choate and *Richard De Gray*, for appellants Harman, Benson, Gaines, and Mazarat.

Farrar, Jones & Kruttschnitt, for appellant W. B. Davenport.

Thomas J. Semmes, for appellees the administrator and the Whitney heirs.

Rouse & Grant, for appellees the Christmas heirs.

WATKINS, J.—The object of this suit is the recovery by the New York administrator of the primary succession of the deceased, in that state, of the residuum of assets of the ancillary succession, in the state of Louisiana, from the administrator appointed under the laws thereof, and for their removal to the Probate Court of Kings county, N. Y., for the purpose of administration and distribution under and in pursuance of the laws of that state, and of the provisions of the will of the deceased, therein admitted to probate.

The demand of the New York administrator, as well as that of certain legatees under the probated will, is resisted mainly on two grounds, viz.:

(1) That the allowance of such an application is within

the discretion of the courts of this state, and this is not a proper case for its exercise.

(2) That our Civil Code requires a complete administration within this state of the succession of non-residents, and that the courts of this state should deal with them as if they were domestic estates.

The facts necessary to be stated as pertinent to the issues involved, and in order to a clear understanding of same, are as follows, viz.: On the 5th of January, 1885, Mrs. Gaines made her will in the city of New Orleans, and died in this city on the 9th of that month, though she was at that time a citizen and resident of the state of New York, and temporarily absent therefrom.

Soon afterwards the persons named in said will as joint testamentary executors thereof presented the same to the Civil District Court for the parish of Orleans, in Louisiana, for probate, but its probate was refused on the ground that it was informal, and not entitled to probate under the laws of Louisiana; though reserving proponents' right to present said will in Washington, D. C., the supposed residence of the deceased at the time of her demise.

On appeal to this court of another branch of the case, the judgment of the lower court was affirmed (38 La. Ann. 123); the proponents of this particular will having acquiesced in the judgment rendered in the court below.

There subsequently arose a controversy in the courts of this state, in 1889, between one of the Christmas grandchildren and one of the Whitney grandchildren, over the administration of the Louisiana succession of deceased; and it was decided in the favor of the latter, who was duly qualified (42 La. Ann. 699; 7 South. Rep. 788); the sole asset thereof being a judgment against the city of New Orleans for the sum of \$923,788. Contemporaneously with these proceedings in Louisiana, others were inaugurated in the Surrogate's Court of Kings county, N. Y., for the purpose of obtaining therein the probate of the aforesaid will of Mrs. Gaines, and which resulted in a judgment of the latter court on the 24th of June, 1891, probating it; and

thereunder William B. Davenport, of New York was appointed temporary administrator of the decedent's estate, in pursuance of the laws of that state.

Subsequently, the administrator of the Louisiana succession of deceased filed an account, wherein are exhibited sundry large amounts as having been paid and disbursed, and certain others as of doubtful validity, the payment whereof ought to be refused; showing a large cash surplus to his credit, unexpended.

The recognized legal heirs of the deceased appeared therein, and preferred claim to this surplus; and their demands are resisted by five different alleged legatees of the deceased under the will that was probated by the New York court,—the aggregate of whose claims being about \$55,000,—and also by the New York administrator.

These various parties appeared by way of oppositions to the account and the demands of the heirs to be placed in possession, and substantially claimed "that the balance of the funds or assets here remaining after the payment of all debts here proved should be paid over to said Davenport, temporary administrator, for distribution by the Surrogate's Court aforesaid," coupling with their demand the prayer that, in the alternative, that said relief should be refused, the court should order the Louisiana administrator to pay same out of the funds in his hands.

The special averments of Davenport's opposition are to the effect that there are large legacies that were created by said will, and debts due, and others contested, which must necessarily be adjusted, paid, or rejected by the New York administrator after same has been passed upon by said Probate Court; and for that purpose he prayed "that the said residue of the estate here remaining, after the payment of all the debts here established, be paid over to him for administration in Kings county, N. Y.

Its further averment is that, under the laws of New York, he, as temporary administrator, has all the powers of an administrator with a will annexed, or dative testamentary executor under the law of Louisiana, and that there are

large legacies created by said will, and debts due by persons domiciled in the state of New York, and also amounts claimed to be due to persons there domiciled, which claims and debts must necessarily be adjusted, and paid or rejected, by the administrator under the will of the deceased in said county of Kings, in the state of New York.

Its further averment is that large amounts are also due for attorney's fees, costs, and disbursements in the matter of the probate of said will, and in the matter of the defeat of another so-called "will," commonly known as the "Evans Will," and that all of said claims should be passed upon by the said court of probate of the domicile of said deceased.

It is further alleged therein that the administration of the deceased estate in Louisiana has been purely auxiliary, and for the purpose of paying debts due creditors of the deceased residing in this state, or those who have obtained judgments in the courts sitting in Louisiana.

After these recitals comes the opponent's prayer for the surrender and delivery to him of the surplus of funds remaining in the administrator's hands after all demands against the Louisiana estate have been paid and fully satisfied.

The foregoing summary of established facts, and the truth of opponents' averments of fact, are conceded, leaving for discussion and decision only the two questions of law heretofore propounded. On the trial, all of said oppositions were dismissed, and the administrator's demands were rejected; the judgment reserving the right of the legatees to make claim for their legacies from the Louisiana administrator, or heirs, in case the court should order the registry and execution of the decedent's will.

In a different proceeding in the same succession, in Louisiana, the lower court rejected and disallowed the will which had been probated in New York, and from that judgment an appeal was prosecuted to this court; and same has this day been decided, and the judgment appealed from reversed. (14 South. Rep. 233.)

In so deciding, the purport of our opinion is that the probate of said will in New York is recognized "to the extent necessary to make it the basis of claims predicated upon it as such,"—the will of deceased.

It is further to the effect that the administration of the estate of Mrs. Gaines in Louisiana is ancillary merely, and that the administration thereof in Kings county, N. Y., is the primary administration of her estate; same having been inaugurated at the place of the decedent's domicile, and predicated upon her will. It is further held that these recognized and established facts must be given effect in the courts of Louisiana as established facts.

It necessarily follows from that judgment that the opponents cannot make claim for the legacies either from the Louisiana administrator or heirs, inasmuch as the will of the deceased has not been ordered to be registered and executed here. And just here it must be observed and borne in mind that this controversy contemplates no further act of administration in Louisiana, but, on the contrary, it proceeds upon the opposite hypothesis,—that the ancillary succession here has been closed and terminated by the payment of all the claims proved or provable here, only contemplating the removal of the residue of assets afterwards.

Hence, the question arises whether opponents have made out, under the law, a proper case for the transfer of the residuum of the ancillary succession in Louisiana to the Probate Court in Kings county, N. Y., for the administration there according to law and the provisions of the will.

The question arose and was decided in the case of *Gravillon v. Richard's Ex'r.* (13 La. 293), in which Judge EUSTIS, as the organ of the court, expressed the opinion of the court as follows, viz.:

"The power of courts to order the remission of the funds belonging to a foreign succession to the representatives of the succession authorized to receive them by the courts of the domicile of the deceased, we consider undoubted. Its exercise is necessarily a matter of discretion, depending on the circumstances of each case, and is a con-

sequence of that comity which prevails between nations in amity with each other. The interests of commerce and of civilization require that this comity should be carried into effect by our tribunals. It is done in England and in other states of the Union, in analogous and similar cases; and, whenever the rights of our citizens are not affected by the act to be done, we shall feel ourselves bound to act on a principle which is impressed upon us equally by an enlightened policy and a certainty that it will tend to the great purposes of justice. * * *

“We therefore determine that, as the interests of no one will be injured thereby, that the court of probates ought to have placed the funds of the estate at the disposal of the syndics and curator of the vacant estate, for the purpose of their being transmitted to the place of domicile of the deceased for distribution.”

The same principal was recognized and reannounced in *Mourain v. Poydras* (6 La. Ann. 151), and again in *Succession of Taylor* (28 La. Ann. 367), and we are aware of no decision of this court to the contrary.

The cases cited by counsel for the Louisiana administrator and heirs *Henderson's Heirs v. Rost* (15 La. Ann. 405), and *Succession of Butler* (30 La. Ann. 890), are dissimilar to this case, in that the demands of foreign administrators were rejected on the ground that they exhibited no legal title to interfere with existing administrations under the local law before same had been concluded by the payment of debts and charges against the ancillary succession.

Nor are the provisions of article 1220 of the Civil Code opposed to the principle we have quoted from the cases cited; the evident intention of that article being to require the administration of the successions of persons domiciled out of the state only to the extent of paying debts by them. The legislative act of 1842 simply requires a foreign executor to furnish bond and security before he can undertake the administration of an estate in Louisiana.

On this question the New York jurisprudence conforms

to our own. (See *Despard v. Churchill*, 53 N. Y. 192, and *Parsons v. Lyman*, 20 N. Y. 103.) The Supreme Court has likewise held in *Wilkins v. Ellett* (9 Wall. 740).

In the brief of the opponents' counsel the following pertinent questions are propounded, viz.: "If the power of the foreign executor to receive the assets belonging to an estate, and which are beyond the territory of the state in which he is appointed, is denied, and he has no right to ask the administrator of the ancillary estate to turn the residuum over to him, how, we ask, is the residuum ever to get to the parent or primary administration for distribution? If the foreign executor must apply and qualify here, and become an officer of this court, how is he to get the fund in this court to the court under which the parent succession is being administered? Must he, as an officer of this court, settle with himself as an officer of the other court? And, if yes, does he then do anything more than he is asking to have done now, to-wit, to have an officer of this court turn over the remaining residuum to the officer of that other court? If his right to receive is only (in a case like the present, where, under the law of New York, he is vested with title) co-extensive with the territorial limits of the state of his appointment, how is he, when made an officer of this court, with a grant of power which can only be, on the same theory, co-extensive with the limits of this state, to get the personal property here beyond the limits of this state?

If such was the law, the personal property here could never be gotten beyond the limits of the state where the same may be found, to pay the debts and legacies that might be due at the testator's domicile."

In our opinion, these questions find a correct answer and solution in the decisions above quoted; and, on the authority of the sound principles of jurisprudence therein formulated, we hold that the New York administrator is legally and rightfully entitled to have the residuum of the assets of the succession of the deceased, remaining in the hands of the Louisiana administrator after all debts and charges therein

have been fully paid and discharged, removed into the Surrogate's Court of Kings county, state of New York, there to be administered and distributed according to law, and in conformity with the will of the deceased.

We further hold and decide that the oppositions were incorrectly overruled and dismissed, and that same should be reinstated and sustained, to the extent of authorizing the transfer of the residuum of the assets to the Surrogate's Court of Kings county, N. Y., the rights of the opposing legatees to there assert their claims being fully reserved.

We further hold and decide that the demand of the legal heirs to be put into possession of said residuum of assets, as an inheritance, was improperly sustained, and must be rejected and disallowed.

It is therefore ordered and decreed that the judgment appealed from be amended and reversed in the following particulars, viz.: First. By rejecting and disallowing the demands of the legal heirs of Mrs. Gaines to be placed in possession of the residuum of the assets of her ancillary succession after debts and charges have been paid. Second. So as to reinstate the oppositions of the legatees and of the New York administrator, and to recognize and specially reserve the right of said legatees to present their demands in the New York court conformably to law, and to have same therein judicially determined contradictorily with said New York administrator. Third. So as to sustain the demands of the opponents, requiring the residuum of assets in the hands of the administrator of the ancillary succession in Louisiana to be transferred to the Surrogate's Court of Kings county, state of New York.

And it is further ordered and decreed that the demands of the legal heirs to be placed in possession of the residuum of the succession be rejected and disallowed ; that the rights of the opposing legatees be reserved to present and have their claim determined in the New York court without prejudice ; and that the administrator of the ancillary succession in Louisiana be ordered and required to transmit, in proper form of law, to the Surrogate's Court, Kings county,

N. Y., the residuum of assets remaining in his hands after all debts and charges against said ancillary succession have been paid and discharged.

It is further and finally ordered and decreed that in the foregoing particulars the account of the administrator be amended and in all other respects approved, and that, as amended, the judgment appealed from be affirmed; costs of oppositions and appeal to be taxed against administrator and appellees.

PARLANGE, J., takes no part.

On the Matter of Rehearing.

(February 12, 1894.)

BREAUX, J. The appellees applied for a rehearing, and for a modification of the decree so as to allow payments here to the legatees under the will. In their application the legatees represent that all the legatees are before the court. They allege that the records do not disclose that Mrs. Gaines was indebted in New York, and that there is no legal necessity to send the legatees to that city to get their money; that no creditor from New York has asked a transfer of the funds to that state; and that the transfer of the funds is a matter of discretion, depending upon the circumstances of each case.

This court having decreed that the domicile of Mrs. Gaines was in New York, attention is directed to the fact that though the decedent was domiciled in New York, and the administration was auxiliary, only, in this state, the legatees, distributees, and creditors may recover amounts due them out of the assets here.

In support of the application the following cases were cited: *In re Hughes* (95 N. Y. 55), *Harvey v. Richards* (1 Mason, 381). Speaking for the court, Judge Story, regarding the *lex rei sitæ*, in this last case, says: "Why should not legatees and distributees be entitled to recover out of the assets here, as well as creditors? It is true that lega-

tees claim by the bounty of the testator, but it is a legal right, as fixed and vested as the right of a creditor. And, as to distributees, the case is still stronger ; for that rests, not on the bounty of the intestate, but on the law of the land, which at the same time enables the creditor to receive his debt out of the assets, and the next of kin to claim the residue."

Upon the authority of this decision from which we have just quoted, appellees principally relied in their application for a rehearing. The appellants also filed a brief on the application for a rehearing, from which we quote: "The validity of the will of Mrs. Gaines being fully established—First, by the decision of the Surrogate's Court of Kings county, N. Y., declaring it to be the last will of the testatrix, and a valid will of real and personal estate ; second, by the recognition thereof as such last will by decree of this court in No. 11,193 (14 South. 233) ; and, third, by the admission of all parties in interest now before the court, in their application for the modification of the decree herein,—the title of the legatees to their respective amounts therein named is beyond dispute, for they are settled by both the judgment of the court and the admission of all parties in interest.

"This being the case, it can make no difference where the legacies provided for in the will are paid,—whether in the home or the ancillary succession." The court ordered that the parties in interest be heard regarding the modification of our decree, so as to avoid, as much as possible, the incurring of further costs and expenses at the home succession, where there are no assets.

At this hearing all the parties in interest were present, and consented to a modification of our former decree, in order that the respective claims represented be paid here, except the counsel for the administrator of the home succession, in New York, who, though not a party to the agreement, interposed no special objection, but asked, if modification of the decree, as applied for, be granted, that the rights of his client, the temporary administrator, and

of all creditors who might recover through his administration of the home succession, in New York, be reserved, that the validity of these claims and charges may be established before the court, contradictorily with the other parties in interest, in the settlement, in so far as relates to the succession funds here.

Under the circumstances, payment can be ordered by the court of all funds in this state. A final settlement may be made of the succession, so far as relates to these funds. The consent of the legatees and of the creditors of the succession support the application to pay the funds on hand to the legatees, distributees, and creditors. It would serve no useful purpose to compel the interested parties and all claimants to abandon their pleas here, in a court of competent jurisdiction, to renew them in another tribunal. The funds, being within the court's jurisdiction, may be paid here, and included in the settlement of the ancillary succession in this state.

The question of the judicial agency through which the settlement shall now be made arises. Shall the present administrator continue in the discharge of his trust, or shall an executor qualify under the will? It devolves upon us to determine.

The last will and testament of Myra Clark Gaines appoints two executors. One of the two survives, and is a resident of the city of New Orleans. This will has been probated, and recognition given by this court to the authority of a judgment pronounced in a sister state, probating the will, and ordering the execution of its terms. The judgment having been rendered by the court having jurisdiction of the domicile of the testatrix, a validity now exists not previously recognized. It follows that the payment should be made by the executor named by the testatrix, and that these funds should be under his administration. The present administrator will have to account to the executor appointed under the will.

It was stated in argument for a rehearing that certain payments had been made by the administrator here on cer-

tain legacies ; and it was said on behalf of the appellants that these payments should be ignored, and that the assets should be accounted for by the administrator to the executor, without reference to these payments. That issue not being before the court, it is not decided, but left to be first passed upon by the court of the first instance. All rights are reserved to the administrator, contradictorily with the executor who may be appointed, to prove the legality and correctness of these payments on legacies and advances to the heirs, if any have been made.

It is therefore ordered, adjudged, and decreed : That this case be remanded to the court *a qua*, to be proceeded with in accordance with law and the views herein expressed. That the legacies, debts, and charges be paid here, and complete settlement made with legatees, distributees, and creditors, to the extent of the funds on hand, and that a final accounting be given and final account filed by the executor of his administration of these funds, and of the ancillary succession in this state.

After all legal claims and charges on the part of legatees, distributees, and creditors shall have been paid, and all entitled to any part of these funds settled with, if there be a residuum, as per final account of the executor, that the residuum be transferred to the legal representative of the estate authorized to receive it, in the Surrogate's Court of Kings county, N. Y.

That upon proper application an executor be appointed to execute the will of Myra Clark Gaines, of January 5, 1885, probated in the Surrogate's Court of Kings county, N. Y., on 24th June, 1891. That he execute the will after having qualified, and that he account as herein ordered. That the administrator of the succession in this state shall account to the executor thus appointed for all amounts received by him, and for all disbursements, and render full account of his gestion.

That all questions of the validity and the effect of payments made by the administrator are left to be in the first instance passed upon by the court of original jurisdiction,

with all needful rights to protect their respective interests reserved.

That all the rights of the temporary administrator appointed by the Surrogate's Court of Kings county, N. Y., be reserved, in order that he may recover all amounts due him, and that all creditors with valid claims be paid in the rank due, and to the extent the funds will pay them. This includes all valid claims and charges, whether presented through the temporary administrator, or independently of his trust—all to be proved up and recovered contradictorily with all parties in interest.

Our former decree is set aside, in so far as it may be necessary to make it conform to our decree at this time—that portion which reads: "First. By rejecting and disallowing the demands of the legal heirs of Mrs. Gaines to be placed in possession of the residum of the assets of her ancillary succession after debts and charges have been paid. Second. So as to reinstate the opposition of the legatees and of the New York administrator, and to recognize and specially reserve the rights of said legatees to present their demands in the New York Court conformably to law, and to have same judicially determined contradictorily with said New York administrator."

That this copied portion, and all of the original decree, is only changed, amended, and annulled to the extent and in these respects necessary to make it conform with the decree now rendered. This amending and annulling, as made, has become necessary in order to carry out the agreement of the interested parties. In all other respects than that before provided, our original decision remains.

The case having been argued, and the agreement made by counsel considered, our decree is changed as above without further hearing. Without the necessity for a rehearing, the modification is made, and rehearing is therefore refused.

Distribution in ancillary administration.—The duty of the administrator is confined to the collection of the assets in the jurisdiction of his appoint-

ment, the payment of the debts in that jurisdiction, if any, and the transmission of the residue to the administration at the place of domicile. *Fretwell v. McLemore*, 52 Ala. 124, 133; *Gibson v. Dowell*, 42 Ark. 164, 167; *Fay v. Haven*, 44 Mass. (3 Met.) 109, 114; *Goodall v. Marshall*, 11 N. H. 88, 90.

The ancillary administration is made subservient to the claims of domestic creditors. *Harris v. Mahorner*, 14 Ala. 829, 833; *Hatchett v. Berney*, 65 Ala. 39, 46; *Fellows v. Lewis*, 65 Ala. 343, 353; *Perkins v. Stone*, 18 Conn. 270, 275; *Richards v. Dutch*, 8 Mass. 508, 515; *Stevens v. Gaylord*, 11 Mass. 257, 269; *Dawes v. Head*, 20 Mass. (8 Pick.) 128, 145; *Davis v. Estey*, 25 Mass. (8 Pick.) 475, 476; *Spradling v. Pipkin*, 15 Mo. 118, 133; *Goodall v. Marshall*, 11 N. H. 88, 91; *Despard v. Churchill*, 53 N. Y. 192, 200; *Re Hughes*, 95 N. Y. 55, 60; *Carroll v. Hughes*, 5 Redf. (N. Y.) 337, 343; *Carmichael v. Ray*, 5 Ired. Eq. (N. C.) 365, 367; *Moye v. May*, 8 Ired. Eq. (N. C.) 131, 134; *Carson v. Oates*, 64 N. C. 115, 116; *Parker's Appeal*, 61 Pa. St. 478, 484; *Gravely v. Gravely*, 25 S. C. 1, 20; *Gilchrest v. Cannon*, 1 Cold. (Tenn.) 581, 587; *St. John v. Hodges*, 9 Baxt. (Tenn.) 334, 342; *Hunt v. Fay*, 7 Vt. 170, 182.

In some states the ancillary administration is said not to be liable to the claims of foreign creditors. *Barry's Appeal*, 88 Pa. St. 131, 133; *Churchill v. Boyden*, 17 Vt. 319, 321. When the domestic debts are paid, the residue will ordinarily be transmitted to the administrator of the domicile for distribution. *Equitable Life Ass. Soc. v. Vogel's Executrix*, 76 Ala. 441, 447. But the tendency of the more recent cases seems to be to accord to non-resident creditors the right to prove their claims under an ancillary administration. *Miner v. Austin*, 45 Iowa, 221, 226; *Dawes v. Head*, 20 Mass. (8 Pick.) 128, 146; *Goodall v. Marshall*, 11 N. H. 88, 94; *Findley v. Gidney*, 75 N. C. 395, 396; *Hays v. Cecil*, 16 Lea. (Tenn.) 160, 163. If the estate is insolvent, creditors in the ancillary jurisdiction will not be paid in full to the prejudice of the creditors elsewhere, but will receive a *pro rata* dividend only. *Perkins v. Stone*, 18 Conn. 270, 275; *Davis v. Estey*, 25 Mass. (8 Pick.) 475, 476. And if a claim has been allowed at the place of the principal administration, it should receive no more in the ancillary administration than will amount in the aggregate to the percentage paid to those whose claims are allowed in the ancillary administration alone. *Miner v. Austin*, 45 Iowa, 221, 227. And it has been held that if the estate is insolvent, foreign creditors cannot claim against the ancillary administration. *Dawes v. Head*, 20 Mass. (8 Pick.) 128, 144.

It was at one time held that the distributees have no claim against the ancillary administration. *Treadwell v. McLemore*, 52 Ala. 124, 133; *Richards v. Dutch*, 8 Mass. 505, 515. But it was also said that if any of the citizens of the ancillary jurisdiction claim as distributees, distribution will be made there. *Spradling v. Pipkin*, 15 Mo. 108, 133. But not on the application of foreign distributees. *Parker's Appeal*, 61 Pa. St. 478, 484. And that the residue would be transmissible to the domiciliary administrator. *Childress v. Bennett*, 10 Ala. 751, 752; *Harrison v. Mahorner*, 14 Ala. 829, 833; *Hatchett v. Berney*, 65 Ala. 39, 46; *McCard v. Thompson*, 92 Ind. 565, 569; *Adams' Heirs v. Adams' Admr.* 11 B. Monr. (Ky.) 77, 79; *Clark v. Clement*, 33 N. H. 563, 568; *Parsons v. Lyman*, 20 N. Y. 103, 120. But the tendency in most of the states is to hold that it may either be so transmitted or be distributed in the forum of

the ancillary administration. *Fretwell v. McLemore*, 52 Ala. 124, 134; *Wright v. Phillips*, 56 Ala. 69, 82; *Young v. Wittenmyre*, 23 Ill. App. 496, 500; *Mourain v. Poydras*, 6 La. Ann. 151, 152; *Cassily v. Meyer*, 4 Md. 1, 7; *Williams v. Williams*, 5 Md. 476, 470; *Stevens v. Gaylord*, 11 Mass. 256, 264; *Porter v. Kortrecht*, 54 Miss. 67, 70; *Heydock's Appeal*, 7 N. H. 496, 503; *Parsons v. Lyman*, 20 N. Y. 103; *Despard v. Churchill*, 53 N. Y. 192, 200; *Re Hughes*, 95 N. Y. 55, 60; *Carmichael v. Ray*, 5 Ired. Eq. (N. C.) 365; *Adlum's Appeal*, 6 Phil. (Pa.) 347; *Moses v. Hart's Admr.*, 25 Gratt. (Va.) 795, 811; *Price v. Mace*, 47 Wis. 23; 1 Am. Prob. Rep. 73. Whether the residuum shall be transmitted to the principal administration or distributed in the ancillary forum is, in the language of Judge Story, "A matter, not of jurisdiction, but of judicial discretion, depending on the circumstances of the particular case." *Harvey v. Richards*, 1 Mass. 381, 418; *United States v. Cox*, 59 U. S. (18 How.) 100, 105; *Fretwell v. McLemore*, 52 Ala. 124, 134; *Wright v. Phillips*, 56 Ala. 69, 82; *Young v. Wittenmyre*, 23 Ill. App. 496, 500; *Mourain v. Poydras*, 6 La. Ann. 151, 152; *Cassily v. Myer*, 4 Md. 1, 7; *Williams v. Williams*, 5 Md. 467, 470; *Portee v. Kortrecht*, 54 Miss. 67, 70; *Parsons v. Lyman*, 20 N. Y. 103; *Despard v. Churchill*, 53 N. Y. 192, 200; *In re Hughes*, 95 N. Y. 55, 60; *Churchill v. Ray*, 5 Ired. Eq. (N. C.) 365; *Moses v. Hart's Admr.*, 25 Gratt. (Va.) 795, 811.

The established rule now is that, in regard to creditors, the administration is governed altogether by the law of the forum. *Harrison v. Sterry*, 9 U. S. (5 Cranch.) 299; *Smith v. Union Bank*, 30 U. S. (5 Pet.) 518, 523; *McElmoyle v. Cohen*, 38 U. S. (13 Pet.) 312; *Olivier v. Townes*, 2 Mart. N. S. (La.) 93, 99; *DeSobey v. DeLaister*, 2 Harr. & J. (Md.) 193, 224; *Dawes v. Head*, 20 Mass. (3 Pick.) 128; *Porter v. Kortrecht*, 54 Miss. 67, 69; *Goodall v. Marshall*, 11 N. H. 88, 91; *Holmes v. Remsen*, 20 Johns. 285; *Moyer v. May*, 8 Ired. Eq. (N. C.) 131, 134; *Carson v. Oates*, 64 N. C. 115, 116; *Milne v. Moreton*, 6 Binn. (Pa.) 353, 361; *Miller's Estate*, 3 Rawle, (Pa.) 312; *St. Johns v. Hedges*, 9 Baxt. (Tenn.) 334. But if the distribution of the surplus is made by the court of the ancillary administration it will follow the *lex domicilii*. *Mackay v. Cox*, 59 U. S. (18 How.) 100, 105; *Harris v. Mahonner*, 14 Ala. 829, 837; *Young v. Wittenmyre*, 23 Ill. App. 496, 500; *Goodall v. Marshall*, 11 N. H. 88; *Despard v. Churchill*, 53 N. Y. 192, 199; *Re Hughes*, 95 N. Y. 55, 60; *Suarez v. Mayor*, 2 Sand. Ch. (N. Y.) 173, 177; *Schultz v. Pulver*, 5 Parc. (N. Y.) 182; *S. C. 11 Wend.* 363; *Carmichael v. Ray*, 5 Ired. Eq. (N. C.) 365; *Tucker v. Condry*, 10 Rich. Eq. (S. C.) 12, 10; *Cureton v. Mills*, 13 S. C. 409, 416; *Gravely v. Gravely*, 25 S. C. 1, 22; *Price v. Mace*, 47 Wis. 23; 1 Am. Prob. Rep. 73, 76.

The effect of the Mississippi statute is to abolish ancillary administration and personal property is distributed according to the laws of that state without regard to the law of the domicile. *Carroll v. McPike*, 53 Miss. 569; *Partee v. Kortrecht*, 54 Miss. 67, 70.

SMYTHE vs. SMYTHE.

[90 Virginia, 638.]

LIFE ESTATE—LIMITATION OVER—POWER TO SELL—CONDITION
IN RESTRAINT OF MARRIAGE.

A bequest of property for life, the use and enjoyment being given in unrestricted terms, with the right to sell and convey the real estate if desirable, the desire being expressed that the proceeds be safely invested and the consumption of the principal avoided as far as possible with a gift over of the remainder, passes a life estate only, and the limitation over is good.

A condition in such bequest that the devisees remain sole and a gift over to the other on the marriage of the one are void.

The devisees have a right to sell and convey the fee.

APPEAL from Circuit Court, Tazewell county.

APPEAL from decree in suit by Kate Smythe against Mattie R. Smythe and others for the construction of a will.

Henry & Graham, for appellant.

J. H. Stuart, for appellees.

FAUNTLEROY, J.—The suit is a friendly suit, instituted to obtain a judicial construction of the last will and testament of Caroline H. Peery, deceased, and for the ratification and confirmation by the court, of a provisional contract for the sale of the real estate devised by the said will.

The will is as follows: "I give and bequeath to my two sisters, Kate A. and Mattie R. Smythe, all my estate of every kind, both real and personal, of which I may die seized, to be by them used and enjoyed during their natural lives. But the benefits of this bequest are to continue to my said two sisters upon condition that they shall remain sole. Should either marry, the said property so bequeathed as aforesaid shall thenceforth be possessed and enjoyed by such one as shall remain sole. The use and enjoyment of said property shall be unrestricted to my said two sisters during their natural lives, should they remain sole; carry-

ing with such use and enjoyment, the right to sell and convey said real estate should they find it desirable to do so ; but I desire that they shall reinvest or loan the proceeds of such sale in some safe manner, and, as far as possible, avoid the consumption of the principal, and at the death of my two sisters, or the marriage of both, I desire whatever of my estate may remain shall vest in and become the property of the little boy, Claude Allison, whom I have adopted."

The bill of complaint states that on the 1st day of October, 1892, they, the said Kate A. Smythe and Mattie R. Smythe, as devisees of the said testatrix, under the discretion given to them in the said will, contracted to sell the said real estate so devised to them as aforesaid to James O'Keefe and Mary S. O'Keefe, "for a good, and, indeed, an excellent, price ; and they pray that the said sale may be ratified and confirmed by the court."

The Circuit Court, in the decree appealed from, held that the devisees, Kate A. Smythe and Mattie R. Smythe, had the right to sell and convey the land to the purchasers, James O'Keefe and Mary S. O'Keefe, as set out in the written contract exhibited with the bill ; and decreed the confirmation of the said sale, and also that the condition placed upon the device in restraint of marriage is null and void, of which said points in the decree there is no complaint. The court, in its said decree, decided that Kate A. Smythe and Mattie R. Smythe take under the will only a life estate, and do not take an absolute fee-simple estate in the real estate devised by the will, and that the limitation over to the adopted child of the testatrix, Claude Allison, is good. That this case is distinguished from the cases of *May v. Joynes*, 20 Grat. 692, and *Cole v. Cole*, 79 Va. 251, and that line of cases, in that the intention of the testatrix as gathered from the language of the will, construed as a whole, is manifest and express to give only a life estate to her two sisters and devisees, Kate A. Smythe and Mattie R. Smythe, coupled with the power of sale and reinvestment or loan ; and the right to sell and reinvest in some safe manner is coupled with the behest that, as far as pos-

sible, the consumption of the principal shall be avoided. And the specific direction to reinvest or loan the proceeds of the sale of the real estate (if made at all) clearly intends not to vest the proceeds of sale, or any part of it, in the said devisees absolutely, but only for their natural lives, with remainder in fee to the little boy, Claude Allison, the adopted child of the testatrix.

We are of opinion that the construction of the will by the Circuit Court, as aforesaid, is just and proper. In the case of *May v. Joynes* the limitation or remainder over of whatever may remain at her death followed the devise, with power of unrestricted and unlimited disposal in any manner, by deed or will, and expressly subject to debts or legacies of the first taker; but in Mrs. Peery's will the estate is given for use and enjoyment during the natural lives of the devisees with the power of sale coupled with the direction of the testatrix that "they shall reinvest or loan the proceeds of such sale in some safe manner, and, as far as possible, avoid the consumption of the principal; and at the death of my two sisters, or the marriage of both, I desire whatever of my estate may remain (so invested or loaned in some safe manner) shall vest in and become the property of the little boy, Claude, whom I have adopted."

We do not think that a just and fair construction of this will will defeat the expressed and indisputable intention of the testatrix by holding that the legal operation of the terms of the will gives to the devisees an absolute estate in fee simple *non obstante* "the plain intention to the contrary appearing by the will itself." It is plainly provided in the will that the devisees — the two sisters of the testatrix — shall enjoy and consume the rents and profits of the land devised, or, if sold, use the interest of the proceeds of sale, which shall be reinvested or loaned in some safe manner, so as to avoid, as far as the contingencies of life and experience will make it possible, the consumption or diminution of the principal, which, at the death of the said devisees, shall vest in, and be the property of, the remainderman, Claude Allison. The fund is a large one, \$9,325, and

will afford ample support to the two unmarried sisters and devisees of the testatrix for their natural lives. The other details of the decree are not complained of, and our judgment is to affirm the decree of the Circuit Court of Tazewell appealed from. Affirmed.

As to the effect of a power of disposition on the nature of the estate, see, *Foster v. Smith*, 156 Mass. 379, *supra*, p. 268, and cross reference note.

CAROLINE HAZELTON *et al.*, Appellants, *vs.* W. H. BOGARDUS
AND EMMA BOGARDUS, Respondents.

[8 Washington, 102.]

ADMINISTRATION — WHEN CLOSED — RIGHTS OF HEIRS — SALE
OF LAND — DESCRIPTION.

Until the administration has been finally closed the real estate is, in Washington, in the actual or constructive possession of the administrator, and the heir has no such title as to enable him to maintain an action to quiet it.

The administration is not closed by the approval of what purports to be a final account without a final settlement and a distribution of the property.

A petition and order for the sale of land describing it as located in a certain township and county, there being no such township in that county, and there being nothing else to indicate any specified property, are nullities and the sale thereunder void.

APPEAL from the Superior Court, King county.

Action to quiet title, by Caroline Hazelton, formerly Caroline Sabel, and John E. Sabel, a minor, and Bessie May Sabel, a minor, by Caroline Hazelton, their guardian, against W. H. Bogardus and Emma Bogardus, his wife. From a judgment for defendants, plaintiffs appeal.

Hill & Gilliam, for appellants.

Preston, Albertson & Donworth, for respondents.

HOYT, J.—This was an action to quiet the title of plaintiffs as against the defendants to a piece of land in King county. The court not only denied plaintiffs any relief, but upon a cross complaint filed by the defendants quieted their title as against the plaintiffs. The allegations of the answer and the undisputed proofs were to the effect that the administration of the estate of the deceased person as heirs of whom the plaintiffs claimed had not been terminated, and for that reason the action of the court in refusing plaintiffs any affirmative relief was correct, as it is now the settled law of this state that actions in relation to the real estate of an ancestor can only be maintained by the heir after the close of administration, unless some special circumstance appears which takes the case out of the general rule. (See *Dunn v. Peterson*, 4 Wash. 170; 29 Pac. Rep. 998; *Balch v. Smith*, 4 Wash. 497; 30 Pac. Rep. 648, and cases therein cited.)

Appellants seek to distinguish the case at bar from the cases above cited, as they were actions in ejectment, whereas this is one to quiet title. We are unable to see why the rule should obtain in one class of cases and not in the other. The heir cannot maintain the action of ejectment, for the reason that the real estate is in the possession, actual or constructive, of the administrator, and he should not be allowed an action to quiet title, for the reason that it is the duty of the administrator to take every step necessary to protect the interests of the estate. It further appears from the opinions in the cases above cited that no complete title, even of an equitable nature, descends to the heir so as to be available to him during the progress of administration.

It is further suggested on the part of the appellants that, since the administration had proceeded so far that the final account of the administrator had been approved, it should be held to have been terminated. Such effect cannot be given to the act of approving what purports to be a final account. The case of *Weyer v. Watt* [Ohio], (28 N. E. 670), is directly in point, and the reasoning and conclusions therein satisfactory. They were to the effect that the ap-

proval of such final account does not determine the administration. To a like effect are the California cases. Until there has been a final settlement of the estate, and a distribution of the property, or some other act equivalent thereto, the jurisdiction of the Probate Court over the estate has not been terminated.

The basis of defendants' prayer for affirmative relief was certain proceedings of the Probate Court culminating in a sale of the property to them. Appellants attack these proceedings on several grounds. It will only be necessary for us to discuss one of them, for the reason that in the case of *Ackerson v. Orchard* (34 Pac. Rep. 1106), (decided by this court December 13, 1893,) proceedings for the sale of real estate fully as defective as these, excepting as to the question to be hereafter considered, were upheld, and a sale made thereunder sustained.

The question not decided by that case grows out of the insufficiency of the description of the land in the petition for the sale thereof and in the order of sale made thereon. In such petition and order the land was described as being in section 24, township 29 N. of range 3 E, whereas the land advertised and sold by virtue of such order was in township 25 N. The proof offered on the trial showed that the land intended to be described in such petition and order was the same as that advertised and sold, and the question presented for our decision is as to the effect of such explanation. If the description in the petition and order had been such as to indicate any certain piece of land, it is possible that they would have furnished authority for selling the land in question, though situated in another township, upon such showing, if it further appeared from the circumstances disclosed by the proofs that the parties interested could not have been misled by the mistake. But here the attempted description is in fact no description at all, for the reason that, in connection with the statement that the land was in township 29 N., was the further statement that it was in King county, in which said township is not situated. It follows that the description can only be made

to apply to any certain piece of land by rejecting a portion thereof as surplusage, and that there is nothing to indicate the portion to be thus rejected. The petition and order can have no greater force than they would have had if there had been no attempt to describe any particular piece of land.

Under our system for the administration of estates it is probable that the legislature could dispense with most of the forms prescribed for proceedings to sell real property, but until it has done so it must be held that at least a petition and an order of sale which substantially describe the property are necessary to pass the title. The curative statute (General Stat. § 3066), relied upon by respondents may be held to have made titles under probate sales good without any petition, but that fact will not aid these proceedings, as such curative act only validates titles where, among other things, an order for the sale of the property had been made by the court, and in legal effect no order had been made for the sale of this land.

The judgment must be reversed, and the cause remanded, with instructions to dismiss the action.

STILES, ANDERS, and SCOTT, JJ., concur. DUNBAR, C. J., concurs in the result.

As to sales of land for payment of debts, see, *Ackerson v. Orchard, supra*, p. 535, and cross reference note.

NELSON, Appellant, vs. BARNETT *et al.*

[123 Mo: 564.]

The final settlement of an administrator cannot be set aside except on the ground of fraud in the procurement of the adjudication.

The procurement of improper credits or the omission of proper charges is not fraud so as to render the settlement subject to attack on that ground.

Such settlement is not a bar to a further accounting as to matters not included in it.

A widow is entitled to credit as administratrix for \$240, expended by her for labor and material for a new dwelling on the land of the deceased, the dwelling house having been destroyed by the cyclone in which he lost his life, she being entitled to remain on the farm with her children and to shelter during the continuance of her quarantine.

An action on the bond of an administratrix to recover the amount of the proceeds of live stock sold by her and not reported to the Probate Court or accounted for on her final settlement is not barred till ten years after such settlement.

APPEAL from Circuit Court, Gentry county.

Action by Robert C. Nelson against Ann Barnett and others to set aside the final settlement of defendant Barnett, as administratrix of the estate of Robert C. Nelson, Sr., deceased. From the decree entered, plaintiff appeals.

By this equitable proceeding, plaintiff sought to set aside, on the ground of fraud, the final settlement of his mother, Ann Barnett (formerly Nelson), as administratrix of the estate of his father, Robert C. Nelson, Sr., deceased. It appeared at the hearing that an error had crept into the final settlement to the extent of \$400, and, this being admitted, the court, in its decree, corrected this error, by surcharging the defendant administratrix with that amount on account of the admitted error, and found the other issues for the defendants, and assessed part of the costs against each of the parties. The decree thus entered, from which plaintiff appeals, is the following: "Now, at this day, this cause coming on to be further heard, and was argued by counsel, and the defendants having stated in open court and admitted by their counsel that the sum of four hundred dollars charged against the estate of Robert C. Nelson, deceased, as the absolute property of the widow, by the defendant Ann Barnett, then Ann Nelson, administratrix of said estate, in her final settlement of said estate, filed in and approved by the Probate Court of this county on the 14th day of May, 1885, and mentioned in the petition, was so charged by mistake, having already been charged in another item, it is ordered by the court that the plaintiff have leave to amend his petition, setting up such fact as ground for relief, which is

done ; and thereupon, upon consideration thereof, and of all and singular the matters and things in the pleadings and evidence set forth and contained, it is ordered, adjudged, and decreed by the court that the said sum of four hundred dollars be, and the same is hereby, surcharged against the said defendant upon said settlement as of the said 14th day of May, 1885, the date of the making and filing of said final settlement, and of the judgment of said Probate Court of Gentry county, Missouri, approving the same ; so that the balance due to the said defendant Ann Barnett, late administratrix, thereon at said date is and shall be the sum of eight hundred and ninety-six dollars and sixty cents (\$896.60), instead of the sum of one thousand two hundred and ninety-six dollars and sixty cents (\$1,296.60), as set forth in said settlement and judgment of the Probate Court ; and the court finds all the other issues for the defendant. It is thereupon ordered and adjudged by the court that the defendants recover of the plaintiff the costs of witnesses, one day, and mileage, attending court the 12th day of September, 1890, the date plaintiff amended his petition, and that execution issue therefor ; and that the defendants recover of the plaintiff all other costs in this behalf expended, and that execution issue therefor."

H. S. Kelley and J. W. Sullinger, for appellant.

McCullough & Peery and S. S. Brown, for respondents.

SHERWOOD, J. — 1. The final settlement of an administrator stands as firmly on an impregnable basis of conclusiveness as does the judgment of any other court, and cannot be impeached except on the ground of fraud in the very act of procuring the judgment, or as it is sometimes expressed in the "concoction" of the judgment. (*McClanahan v. West*, 100 Mo., *loc. cit.* 320 ; 13 S. W. 674), and cases cited ; (*Nichols v. Stevens*, 123 Mo. 96 ; 25 S. W. 578.) This has been the uniform ruling in respect of final settlements of Probate Courts

in this state. (*Jones v. Brinker*, 20 Mo. 87; *State v. Roland*, 23 Mo. 95; *Barton v. Barton*, 35 Mo. 158; *Picot v. Bates*, 47 Mo. 390; *Oldham v. Trimble*, 15 Mo. 225; *Woodworth v. Woodworth*, 70 Mo. 601; *Lewis v. Williams*, 54 Mo. 200; *Smith v. Sims*, 77 Mo. 272; *Sheetz v. Kirtley*, 62 Mo. 417; *Miller v. Major*, 67 Mo. 247; *State v. Gray* 106 Mo. 526; 17 S. W. 500); and numerous other cases.

And resort cannot be had to a Court of Equity to grant a new trial, and permit the reagitation of matters which have already been adjudicated. (*Murphy v. De France*, 101 Mo. 151; 13 S. W. Rep. 756.)

And it is well settled that the procurement of merely illegal allowances, or the omission of proper debits in the account presented for a final settlement, will not render such settlement vulnerable to attack in a Court of Equity on the ground of fraud. Nothing presented by the facts in this case brings it within the operation of the rule heretofore noted.

2. But a judgment of a Probate Court on a final settlement of an administrator is, of course, conclusive only as to matters therein embraced. *In order that any matter can be said to have passed in rem judicatum, it must have been tried and adjudicated by the court.* (2 Woerner, Adm'n, § 506), and cases cited.

And it has been determined in this state that parol evidence may be introduced to show that certain matters, as to which the record is silent, were not passed on in a judgment of allowance in a Probate court. (*Sweet v. Maupin*, 65 Mo. 65; *Id.*, 47 Mo. 323.)

Like rulings have frequently been made as to judgments of Circuit Courts. (*Bell v. Hoagland*, 15 Mo. 360; *Clemens v. Murphy*, 40 Mo. 121; *Wright v. Salisbury*, 46 Mo. 26; *Wells v. Moore*, 49 Mo. 229; *Spradling v. Conway*, 51 Mo. 51. See, also, *Freem. Judgm.* §§ 273, 274, and cases cited; *Packet Co. v. Sickles*, 24 How. 333; *Id.*, 5 Wall. 580.)

In this case it seems there are matters which were not embraced in the final settlement. If this is true, then, of course, the matters thus non-included, and not having been

tried and adjudicated, are still open for trial and adjudication, and as to them the final settlement constitutes no adjudicatory barrier. See authorities last aforesaid.

3. But in this category will not be included the rents and profits of the land, the widow's dower not having been assigned, and her quarantine remaining therefore intact. (*Gentry v. Gentry*, 26 S. W. Rep. 1090, and cases cited); and this is true notwithstanding such rents and profits were not mentioned in the final settlement made.

As to the materials and carpenter work, costing something like \$240, these items were included in the final settlement, and therefore cannot now be questioned.

But they cannot be questioned for a reason equally as valid. The dwelling house on the farm had been swept away by a cyclone, in which the father and head of the family perished. The widow and children were entitled to a shelter while she and her children remained on the farm. Having the right to remain on the farm during the continuance of her quarantine, we regard the comparatively small expenditure used to build a small dwelling house as, under the circumstances, a legitimate one, and properly allowed by the Probate Court; equally as legitimate as if, instead of destroying the house, the cyclone had simply taken off the roof, in which case it would seem that it could scarcely be doubted that the right to repair or renew the roof would be a reasonable and proper expense, subject to the approval of the Probate Court.

4. The final settlement in this case was made in 1885, and the plaintiff attained his majority on the 28th of September, 1890. Under our rulings, the statute of limitations does not run in favor of an administrator on his bond until ten years after his final settlement. (*State v. St. Genome*, 8 Mo. 286; *State v. Blackwell*, 20 Mo. 97; *State v. St. Gemme*, 31 Mo. 230.)

This being the case, if it be clearly made to appear that certain items, to wit, the proceeds arising from the sale of the stock on hand, were not reported to the Probate Court, and did not enter into the final settlement of the adminis-

tratrix, the right of action of plaintiff is not yet barred, nor is he debarred by this proceeding. For the reasons aforesaid, the decree is affirmed.

All concur.

MILWAUKEE PROTESTANT HOME FOR AGED, Appellant, v.
BECHER, Guardian *ad litem* AND OTHERS, Resp'ts.

[87 Wisconsin, 409.]

LIMITATIONS OF CHARITABLE DEVISES—VOID DEVISE—INTES-
TACY OR RESIDUUM.

- A devise to any charitable corporation is void if made within three months of testator's death, under Laws Wis. 1891, c. 359, amending the statute of perpetuities (Rev. St. 1878, § 2039) by providing that religious corporations shall be deemed charitable corporations within the provisions of that section, excepting gifts, grants and devises to literary and charitable corporations, and that no gifts, grant or devises to any such literary or charitable corporation shall be valid unless made at least three months before the death of the person making it, the prohibition not being limited to gifts to religious corporations.
- A void devise will be considered personalty and pass to the residuary legatee under a will which directs the executors to dispose of the real estate within five years after the death of the testator.

APPEAL from Circuit Court, Milwaukee county.

Application for an order directing the executors to turn over lands to petitioner. From a judgment of the circuit court reversing an order of the county court granting the petition, petitioner appeals.

G. W. Hazelton and T. L. Kennan, for appellant.

Dalberg & Becher, for respondents.

WINSLOW, J;—The controlling question arising on this appeal is as to the proper construction of chapter 359, Laws 1891. Section 2039, Rev. St. 1878, is as follows: "The

absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate and twenty-one years thereafter, except when real estate is given, granted or devised to literary or charitable corporations which shall have been organized under the laws of this state for their sole use and benefit, and except also in the single case mentioned in the next section." This section was amended by chapter 359, Laws 1891, by adding at the end the following words: "Religious corporations or societies, incorporated or organized under the laws of this state, shall be held and considered charitable corporations, within the provisions of this section; but no gift, grant or devise of real estate to any such literary or charitable corporation shall be valid, unless made at least three months before the death of the person making the same. Provided, however, that no person leaving a widow, child, or parent, shall by his last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust, or otherwise, more than one-half part of his estate after the payment of his debts; and such devise or bequest shall be valid to the extent of such one-half, and no more."

It was assumed by both parties, on the argument, that the Milwaukee Protestant Home for the Aged is, as its name indicates, a charitable corporation, within the meaning of section 2039, and we shall so regard it. The question, then, is: Is the devise to it void because made within three months prior to the testator's death? The amendment of 1891 provides that "no gift, grant or devise of real estate to any such literary or charitable corporation shall be valid, unless made at least three months," etc. It was very ingeniously argued by counsel for the appellant that the word "such," in the sentence just quoted, must have a controlling effect, and that it must be held to refer only to a religious corporation or society. It is true that the word "such," if it stood alone, would naturally be construed as

referring to the class of corporations of which mention had just been made. Thus, if the sentence were, "No gift, grant or devise to any such corporation shall be valid," the very natural construction would seem to be that "such" referred alone to religious corporations just previously defined. But the words are "any such literary or charitable corporation." We do not suppose it will be seriously claimed that a religious corporation can be properly called a "literary" corporation. If it were so, then there would be no necessity for the legislature to declare that it should be considered a charitable corporation, within the meaning of section 2039, because that section already included literary corporations within its terms. It follows that in order to adopt appellant's construction the word "literary" must be held to be utterly unmeaning surplusage. In other words, "such literary and charitable corporation" means simply "such charitable corporation," and no more. We cannot reject so important a word as the one in question without the most cogent and weighty reasons. All the words of a statute are to be given effect, if possible. By construing the word "such" as referring to the corporation named in the original section, 2039, Rev. St. (a construction entirely permissible), the word "literary" can be preserved as a word of meaning and significance in the statute. On the other hand, by construction "such" as referring to "religious" corporations alone, we are obliged to reject the word "literary" from the statute entirely. By all rules of construction, therefore, we are compelled to hold that the statute renders void all such devises to all literary and charitable corporations, whether they are religious corporations or not. It follows that the devise to the Protestant Home was void.

It is urged, however, by appellant, that, even if the devise is held void, still the property would not go to the residuary legatees, but to the heirs-at-law, as intestate estate, and consequently the residuary legatees have no interest in the litigation, and were not aggrieved by the order of the County Court, and that their appeal, therefore,

to the Circuit Court, should have been dismissed. It is freely conceded that, were this a void legacy of personal property, it would pass, under the residuary clause, to the residuary legatees; but it is claimed that a void devise of real estate is subject to a different rule, and that the property covered by it will not go into the residuum, but will pass to the heirs as intestate estate. This doctrine, certainly, has the support of many courts. The cases will be found collated in 13 Am. & Eng. Enc. Law, p. 40, note 3. It is unnecessary to examine into the reasons for the original adoption of such a rule, nor is it necessary to decide whether it is in force in this state. In the will before us there is a clause directing the executors to dispose of the testator's real estate within five years after his death. The property in question is a part of the testator's real estate, though the devise be void. The doctrine of equitable conversion will therefore apply, as laid down in *Dodge v. Williams* (64 Wis. 70; 1 N. W. Rep. 92 and 50 N. W. Rep. 1103). The property will be treated as personal property from the death of the testator. Considered as personal property, there can be no doubt that it passed, under the very comprehensive residuary clause of the will, to the residuary legatees.

Orders affirmed.

LEONARD, Executor, vs. OWEN.

[63 Georgia, 678.]

LIFE ESTATE IN PERSONALTY—INCREASE OF LIVE STOCK—EX-
CHANGES—RATIFICATION.

Under a bequest of land, live stock and other property for life, in lieu of dower, without any restriction except that a son should have all his necessary expenses for education, board and clothing paid out of the proceeds of the farm and stock, the will directing that after the death of the widow the property given to her be sold and the proceeds divided among testator's children, the natural increase of the live stock belongs absolutely to the widow, and at her death passes to her legal representatives.

The sale or exchange of any of the live stock by the widow is a tort, which the executor may, however, waive by ratifying the exchanges and taking the proceeds.

Error from Superior Court, Talbot County.

Writ of error by John P. Leonard, Executor, to a judgment in favor of Albert Owen.

J. M. McGehee, J. H. Worrill and Peabody, Brannon, Hatcher & Martin, for plaintiff in error.

Willis & Persons, for defendant in error.

LUMPKIN, J. — Certain mules and a horse, some cattle, hogs, wagons and other personalty which need not be more particularly mentioned, were advertised for sale by Leonard, as the executor of James T. Owen, and a claim was interposed by Albert Owen, a son of the testator. Upon the trial of the issue thus made, a nonsuit was granted against the executor, and he excepted.

By the third item of the will of James T. Owen, he devised to his wife, during her natural life, certain land, and also bequeathed to her his entire stock of horses, mules, cattle, and hogs, certain vehicles and harness, household and kitchen furniture, plantation tools, etc. These provisions were made for her in lieu of dower. It is evident from the eighth item of the will that the personalty covered by the above-mentioned bequest was given to the wife during her life only; this item, after providing that certain advancements to the testator's children should be accounted for, directed that, after her death, "all the property given to her in the third item of this will be sold by my executor, and the proceeds of said sale be equally divided among all my children." In another item the testator directed that his son Albert should "have all his necessary expenses for education, board, and clothing paid out of the proceeds of the farm and stock mentioned above."

It appears from the evidence that, after the testator's death, the executor delivered to the widow one mare, two horse colts, and certain mules, cattle, hogs, vehicles, planta-

tion tools, and other personalty. She lived eleven years, during which time her son Albert, with her consent, traded off all the mules and horses delivered to her by the executor except one. That one the executor sold without objection. It is probable that several exchanges were made between the time of the testator's death and that of Mrs. Owen, but all of them were made with her knowledge and approbation. After her death, the executor found certain cattle and hogs upon the place, but did not know whether any of them were the same he had delivered to the widow.

His information was that they were the increase of those originally turned over to her. As to the other personal property in controversy, the record does not disclose whether it was the same originally delivered to Mrs. Owen, or had been otherwise acquired by her.

1. We think, in the first place, that the executor had no right to sell the natural increase of the cattle and hogs, but that they belonged absolutely to the widow, and passed at her death to her representatives. (*Horry v. Glover*, 2 Hill, Eq. 515; *Dunbar's Ex'rs v. Woodcock's Ex'r* 10 Leigh, 688.) These cases, it is true, are authority also for the proposition that, where a life tenant takes the increase of animals, there is a corresponding obligation to keep up the stock to its original number; but, under section 2256 of our Code, the natural increase belong to the life tenant, without such condition. (See, also, *Saunders v. Haughton*, 8 Ired. Eq. 217.)

We think, however, the executor did have the right to sell the horses and mules received by the widow in exchange for similar animals which the testator had left to her. There can be no doubt that a life estate may be created in live stock, it being property not strictly consumable in the use. See the cases above cited, and also, *Burnett v. Lester*, (53 Ill. 325); *Holman's Appeal*, (24 Pa. St. 178); and *Flowers v. Franklin*, (5 Watts, 265). If the widow had died shortly after the death of the testator, the executor could, and doubtless would have sold the identical horses and mules he had delivered to her. She lived many years, however, and

the exchanges above mentioned took place. Had the farm and the live stock been left to the widow by a will contemplating that the testator's estate should be kept together used, managed, and improved by the widow for the benefit of herself and children, with remainder over to the children at the death of the widow,—that is, if a trust had been imposed upon her to maintain the farm as a going concern, as in the cases of *Flowers v. Franklin*, (*supra*), and *Lynde v. Estabroak*, (7 Allen, 68),—It may be that the widow would have had a legal right to dispose of the live stock when the animals became impaired by age or use, and to replace them with others more suitable for the purposes intended; and in that event the animals on hand at the time of her death would, of course, form a part of the estate in remainder. We do not understand that the will in the present case is of this kind. It imposes upon the widow none of the duties above indicated. The provision that the testator's son Albert shall have his education, board, and clothing paid for out of the proceeds of the farm and stock is hardly sufficient to bring this will within the same class as those referred to in the two cases last cited. We think, therefore, that the conversion by the widow of the mules and horses was tortious, not in the sense of being morally wrong, but as being unauthorized under the law applicable to a will of the kind with which we are now dealing. It was, however, the right of the executor, if he considered it beneficial to the estate, to waive the tort, and to treat the exchanges made by the widow as investments of the corpus which, but for such exchanges, would or might have come to him specifically for administration under the will in the behalf of the remainder-men.

2. The evidence, as already stated, does not disclose how the tools, vehicles, etc., found upon the premises after the death of the widow were acquired, or to whom they belonged. If they were the identical articles disposed of by the will, or were received in exchange for such articles, or purchased with the proceeds of the sale of the same, the executor has unquestionably the right to sell them as a

part of the testator's estate. If these articles were otherwise acquired by the widow, or if they belonged to her son Albert who was in possession of the land after her death, and who claimed them, the executor has no right to sell the same. If these articles are of sufficient value to be worth litigating over, the question of title can be settled at the next trial. Judgment reversed.

WILLIAM BRAITHWAITE, Appellant, *vs.* PHILLIP HARVEY,
Respondent.

[14 Montana, 208.]

ADMINISTRATORS—FOREIGN JUDGMENT—LIMITATION OF
ACTIONS.

A judgment recovered against an administrator does not bind the administrator of the same decedent appointed in another state.

The administrator appointed in the latter state has no authority to bind the estate in his charge by appearing in the action and defending in the name of the administrator there appointed.

Credit can be given for an amount realized in part satisfaction of a judgment of another state without pleading such judgment.

A letter written by a debtor to one of two claimants of a demand "if I do not hear from you soon, I will tender the amount due. Whatever is due is ready whenever I can safely pay either you or" the other claimant; and another to the same person, "I am not satisfied with the settlement. Please write me your understanding of it—if I settle with your folks, if they will see me clear of" the other claimant, are not sufficient to remove the bar of the statute of limitations as they do not contain an unconditional, definite and unqualified acknowledgment of any certain demand and promise to pay it.

APPEAL from District Court, Custer county.

Action by William Braithwaite against Phillip Harvey, as administrator. Plaintiff appeals from a judgment for defendant.

Geo W. Newton and Middleton & Leigh, for appellant.

Strevell & Porter, for respondent.

PEMBERTON, C. J.—Through this action plaintiff seeks to recover judgment against Phillip Harvey, administrator of Joseph Leighton, deceased, on demand for the payment of \$5,535.93, and interest, arising on a contract hereinafter referred to. The claim was presented to and disallowed by the administrator of the decedent. This action was then brought in the District Court thereon. The questions involved in this appeal arise on the action of the Trial Court in striking from the complaint portions thereof, on motion of defendant, and thereafter sustaining demurrer interposed to the complaint, on the ground that it shows no sufficient facts to constitute a cause of action, because it appears on the face thereof that the cause of action is barred by the statute of limitations. It appears that in 1880 a contract for the transportation of certain freight from Bismarck, Dak., via the Missouri river by boat to Ft. Buford, was made between plaintiff, as transporter, and decedent and several others, as consignors. The contract was made and evidenced by the following letter: "Bismarck, D. T., Nov. 3d, 1880. Capt. Wm. Braithwaite, Steamer Eclipse—Dear Sir: On your accepting this proposition, will agree to give you one dollar and seventy-five cents (\$1.75) per one hundred pounds, from Bismarck to Ft. Buford, on freight up to the amount of one hundred tons, and on all over and above one hundred tons, one dollar and fifty cents (\$1.50) per one hundred pounds. Receipts to be equal to 100 tons to Buford. Freight to be paid on receipt of bills of lading by draft at ten days' sight on Jos. Leighton, St. Paul. Yours, &c., J. C. Barr, Agt. for H. C. Akin, Jos. Leighton, & Benton Line."

The freight mentioned was transported, as appears, with some delays and other incidents in relation to the fulfillment of the contract, which are not necessary to recite in this determination, and thereby the claim for the enforcement of which this suit is prosecuted accrued in said year.

The complaint not only pleads this contract, but alleges

that on the 12th day of November, 1887, this plaintiff instituted a suit in the District Court of the then territory of Dakota, in and for the county of Burleigh, now in the state of North Dakota, against Joseph Leighton, and several other parties alleged to be interested with him, to recover the amount alleged to be due plaintiff thereon. This suit was by attachment, and the property of Joseph Leighton in said territory at the time was seized thereunder. All the proceedings in said suit, and the history thereof, are set out in the complaint, or referred to as exhibits, and made part thereof, including the judgment of the District Court, and the appeal therefrom to the Supreme Court of said territory, and the judgment of said Supreme Court. In these allegations the death of Joseph Leighton is shown to have occurred on the 2d day of September, 1888, at Custer county, in the state of Montana, where he resided. Joseph Leighton was never personally served with process in the Dakota suit. After his death one Harvey Harris was appointed administrator of the estate in Dakota territory, and appeared as such, and defended such suit. It seems, too, that, pending said suit in Dakota, certain other parties were permitted to intervene therein. These matters are particularly set out in paragraphs 17, 19, 20, 21, 22, and 23 of the complaint, and are as follows:

“(17) That thereafter, on or about the 11th day of February, 1889, one Harvey Harris, of said Burleigh county, was duly appointed administrator of the estate of said Joseph Leighton, deceased, by the then Probate Court of said Burleigh county, territory of Dakota, the same being a court of general jurisdiction in probate matters, and having and possessing jurisdiction for the appointment of the said Harris, as hereinbefore shown; that, after qualifying under said appointment, in accordance with the laws of the then territory of Dakota, now state of North Dakota, the said Harris entered upon the discharge of his duties as such administrator of the estate of said Joseph Leighton, deceased, in said Burleigh county and territory, and continued in the discharge of said duties as such administrator, until the

said estate in said Burleigh county, then territory of Dakota, now state of North Dakota, was fully administered.

“(19) That thereafter, on or about the 15th day of March, 1889, by stipulation, a copy of which is hereto attached and referred to, and found upon page 46 of Exhibit ‘one,’ and by an order of said District Court, in which said action was pending, a copy of which order is hereto attached and referred to, and found upon pages 47 and 48 of Exhibit ‘one,’ hereto attached, said Harvey Harris, as administrator of the estate of Joseph Leighton, deceased, came into said court, and entered his appearance in said action, and as a party defendant therein, and as the administrator and successor of said Joseph Leighton, deceased, and that said action was revived and continued against said Harris, as said administrator, and thereafter proceeded with said Harris as said administrator of said Joseph Leighton, deceased, as a party defendant.

“(20) That on or about the 23d day of February, 1889, William Rea and Geo F. Robinson, copartners as Robinson, Rea & Co., J. C. Kay and Woodruff McKnight, copartners as Kay, McKnight & Co., A. W. Cadman as A. W. Cadman & Co., and Joseph McC. Biggert, applied to said court to intervene in said action, and by said court were permitted so to do, and so did, and thereafter said action proceeded with said interveners as parties thereto; and that a copy of the order of said court permitting said intervention is hereto attached and referred to, and found on pages 51 to 62 of Exhibit ‘one,’ hereto attached; and said interveners served and filed their complaint in intervention in said action, and a copy of the same is hereto attached, and referred to and found upon pages 53 to 60 of said Exhibit ‘one,’ hereto attached; and that thereafter, on or about the 22d day of March, 1889, the plaintiff served and filed his answer to said interveners’ complaint, and a copy of the same is hereto attached, and referred to and made a part hereof, and found upon pages 61 to 66 of Exhibit ‘one,’ hereto attached.

“(21) That the defendant herein, as the general adminis-

trator of the estate of said Joseph Leighton, deceased, immediately upon his appointment and qualification as such, as hereinbefore shown, was notified of the pendency of said action in said Burleigh county, territory of Dakota, now state of North Dakota, and of the plaintiff's claim therein, and thereafter said action proceeded to trial in said District Court, and the defendant herein the same contested and defended in the name of said Harvey Harris as administrator, as hereinbefore shown, and therefor invoked the jurisdiction and determination of said court, employed counsel, produced evidence, and the issues of said contest and defense prosecuted to a final determination; and such proceedings were had in said action from time to time by the direction and co-operation of the defendant herein that on the 28th day of August, 1891, final judgment was rendered and entered in said action, in favor of the plaintiff and the said interveners, and against the defendant Harvey Harris, as administrator of the estate of said Joseph Leighton, deceased, to be paid in due course of administration, and the other defendants in said action, except Akin, for the sum of seven thousand three hundred and thirty-three dollars and eighty-five cents, and for certain costs of said action, amounting to the sum of two hundred and fifty dollars and thirty-six cents, and that said judgment is in full force and unreversed, and that a copy thereof is hereto attached, and referred to as, and made a part of, this allegation, and found upon pages 73 to 89 of Exhibit 'one,' hereto attached.

“(22) That the said Joseph Leighton, in his lifetime, in writing, signed by him, the said Joseph Leighton, and on the 21st day of July, 1888, acknowledged the said indebtedness under the said contract for the work, labor, and service performed under and by virtue of said contract of affreightment by this plaintiff, as aforesaid, which acknowledgment was in words and figures as follows, that is to say: ‘Joseph Leighton, President. W. B. Jordan, Vice Pres’t. E. B. Weirick, Cashier. H. B. Wiley, Asst. Cashier. 2,752. First National Bank. Capital, \$50,000. Surplus and undivided profits, \$65,000. Miles City, Mon-

tana, 7-21, 1888. J. D. Biggert, Pittsburgh — Dear Sir: Nothing from you yet. If I don't hear soon, I will go to Bismarck, and tender amt. due, as I don't want to be bothered any more. Whatever is due is ready, as it has been for the last 7 years, whenever I can safely pay either you or Braithwaite. Yours, truly, J. Leighton.'

"That the sum owing to plaintiff, as shown by the allegations hereinbefore contained, was the amount, and not otherwise, referred to in said letter; and the Braithwaite mentioned therein is this plaintiff, and none other; and the said J. B. Biggert, claiming to act and acting on behalf of said interveners, was not a stranger to the transaction. That on divers and sundry times the said Joseph Leighton acknowledged said indebtedness, to wit, on the 27th day of June, 1888, on the 22d day of July, 1888, and on the 5th day of August, 1888, as will more fully appear from pages 74 to 77, of Exhibit 'one,' hereto annexed, and made a part hereof. That again, on the 1st day of August, 1888, the said Joseph Leighton, by one George T. Webster, his attorney, duly authorized so to do, acknowledged under oath the making of the contract of affreightment hereinbefore mentioned, and the voyage, as will more fully appear from pages 42 to 45, of said Exhibit 'one,' hereto annexed, and made and referred to as a part hereof.

"(23) That there has been paid plaintiff and applied in liquidation of a part of the amount so due plaintiff, as aforesaid, from the said Harvey Harris, as administrator of the estate of Joseph Leighton, deceased, the sum of four hundred and thirteen and 92-100 (\$413.92) dollars, said payment being made on the 31st day of March, 1892. That theretofore, and the 28th day of November, 1891, there was paid on account of said indebtedness owing to this plaintiff the further sum of two thousand dollars (\$2,000.00), which sum was paid for and in behalf of the said Joseph Leighton by Kelly & Jordan, who had heretofore obligated themselves to pay the same for and in behalf of the said Joseph Leighton. And that the estate of the said deceased in the territory of Dakota, now state of North Dakota,

has been fully administered upon, settled and exhausted, and said administrator's final accounts presented to the County Court in and for said Burleigh county, state of North Dakota, the same having exclusive jurisdiction therein, and by said court passed, allowed, and approved, and said administrator discharged from said trust, and that a copy of the order of said County Court passing, allowing, and approving said final account is hereto attached, and referred to and made a part hereof, and found on pages 92 to 94, of Exhibit 'one,' hereto attached."

On motion of the defendant the court struck these paragraphs from the complaint, on the ground that they were irrelevant and redundant. This action of the court is assigned as error. To determine this question it is necessary to determine the force and effect of a judgment against an administrator in one state against the administrator of the same estate in another state.

In *Johnson v. Powers*, (139 U. S. 156 ; 11 Sup. Ct. 525), this subject is thoroughly discussed, and the authorities are collected and cited. In this case Mr. Justice GRAY, delivering the opinion of the court, says :

" A judgment *in rem* binds only the property within the control of the court which rendered it, and a judgment *in personam* binds only the parties to that judgment and those in privity with them.

A judgment recovered against the administrator of a deceased person in one state is no evidence of debt in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person appointed there, or against any other person having assets of the deceased. (*Aspden v. Nixon*, 4 How. 467 ; *Stacy v. Thrasher*, 6 id. 44 ; *McLean v. Meek*, 18 id. 16 ; *Low v. Bartlett*, 8 Allen, 259.)

In *Stacy v. Thrasher*, in which a judgment, recovered in one state against an administrator appointed in that state, upon an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the Circuit Court of the United States held

within another state against an administrator there appointed of the same intestate, the reasons given by Mr. Justice GREER have so strong a bearing on the case before us, and on the argument of the appellant, as to be worth quoting from :

‘The administrator receives his authority from the ordinary, or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and incumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction.’ (6 How. 53.)

“In answering the objection that to apply these principles to a judgment obtained in another state of the Union would be to deny it the faith and credit, and the effect, to which it was entitled by the constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel, only between the same parties, or their privies, or on the same subject-matter when the proceeding was *in rem* ; and that the parties to the judgments in question were not the same ; neither were they privies, in blood, in law, or by estate ; and proceeded as follows :

“ ‘An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him ; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, incumbered by the same debts.’ (*Stacy v. Thrasher*, 6 How. 59, 60.)

“ ‘It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the

judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts. Therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But that is not true, either in fact or in legal construction. The judgment is against the person of the administrator that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger.' 'The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is *res inter alios acta*. It cannot even be *prima facie* evidence of a debt, for, if it have any effect at all, it must be as a judgment and operate by way of estoppel.'" (*Stacy v. Thrasher*, 6 How. 60, 61.)

"In *Low v. Bartlett*, above cited, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similar to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying: 'The judgment in Vermont was in no sense a judgment against them, nor against the property, which they had received from the executor.' (8 Allen, 266.)"

If the judgment recovered in Dakota against the administrator there, is of no binding force and effect, not even effectual as evidence of a debt, against the administrator in this state, as is held by the authority just quoted, then the

pleading of the same, as is done in this case, could subserve no valuable purpose, and it cannot be properly contended that the court erred in striking the same, and all reference thereto, from the complaint. Appellant contends that it was necessary to plead such judgment and proceedings in order to show that the demand sued on here had been given credit for the amount realized under the Dakota judgment. We think this position untenable. Such credit could not have been given in any suit on the demand in litigation.

The appellant further contends that it was necessary to plead the Dakota judgment and proceedings, in order to show that the Montana administrator, the defendant here, is estopped from disputing the claim sued on by reason of his having taken part, as alleged in paragraph 21, stricken from the complaint, in defending said Dakota suit in the name of Harvey Harris, administrator there. We think this contention cannot be maintained. There was no privity between these two administrators. This defendant had no authority to act or bind the estate outside of the jurisdiction of his own state or appointment. (See *Johnson v. Powers*, *supra*, and authorities cited therein. 1 Woerner, Adm'n, p. 362, § 160.)

Appellant contends that, whatever force and effect the court might give the Dakota judgment and proceeding set out in the complaint, and the action of the court therein, still he has a cause of action independent thereof, by reason of the alleged new promise in writing of Leighton in his lifetime, pleaded in paragraph 22 of the complaint, which was stricken out by the court. After striking out said parts of the complaint, the court sustained defendant's demurrer thereto on the ground that the demand sued on was barred by the statute of limitations. This action of the court is especially attacked and complained of by appellant, as he says the court, by striking out paragraph 22 of the complaint, left the same demurrable, as said paragraph set up, as claimed, a new promise, made by Leighton in his lifetime, to pay the demand sued on. While perhaps it would have been more appropriate to attack this particu-

lar paragraph of the complaint by demurrer, yet whether prejudicial error was committed by the court in its action we will consider later on. Does paragraph 22 of the complaint contain and plead such a new promise to pay the demand sued on as will relieve it from the bar of the statute of limitations? It is conceded that the demand is barred unless the bar is removed by the new promise of Leighton in his lifetime, set out in said paragraph 22. We will consider this question as if said paragraph had not been stricken from the complaint. The written new promise of Leighton relied on to remove the bar of the statute of limitations in this case is as follows: "Miles City, Montana, 7-21, 1888. J. D. Biggert, Pittsburg—Dear Sir: Nothing from you yet. If I don't hear soon, I will go to Bismarck and tender amt. due, as I don't want to be bothered any more. Whatever is due is ready, as it has been for the last seven years, whenever I can safely pay either you or Braithwaite. Yours, truly, J. Leighton."

The appellant relies on two other written instruments, signed by said Leighton, to relieve this demand from the bar of said statute. The instruments are as follows: "Miles City, Montana, 6-27, 1888. John Biggert, Pittsburg—Dear Sir: Have just returned, and have been looking over matters. I am not satisfied about the settlement of Eclipse trip. Please write me your understanding of it. Also, if I settle with your folks, if they will see me clear of Braithwaite, &c. Write me at once. Yours, truly, J. Leighton."

"Miles City, Montana, 7-22, 1888. J. D. Biggert, Pittsburg—Dear Sir: Yours, with check, at hand. I am anxious to see Joe better. He came out, and figured up books, and saw that we had a loss for 1, and went away satisfied, but will write him after I get his letter. I cannot wait long for your decision. You know I am very ill, and I must have this thing off my hands. I want to help you in the matter, but the suit has got to be attended to. Very truly, J. Leighton. Why don't you write me about your letter of April, '82?"

These last two instruments are referred to as exhibits, and the first instrument is set out in full in said paragraph 22. Said first written instrument or letter is especially relied on by appellant as constituting such an acknowledgment of the demand sued on, and new promise to pay the same, as to take the debt out of the operation of the statute of limitations.

In *Bell v. Morrison* (1 Pet. 352),—a case involving the doctrine under discussion,—Mr. Justice STORY, speaking for the court, says: “To remove the bar of the statute of limitations by a new promise, it must be determinate and unequivocal; and, if a new promise is to be raised by implication of law from an acknowledgment, there must be an unqualified acknowledgment of a subsisting debt which the party is liable and willing to pay.”

In *Biddel v. Brizzolara*, (56 Cal.) at page 382, the court say: “‘If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the promise or intention to pay; if the expressions be equivocal, vague, and undeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways,—we think they ought not to go to a jury as evidence of a new promise to revive the cause of action.’ Mr. Justice STORY in *Bell v. Morrison* (1 Pet. 362).” “An acknowledgment of the debt to take the case out of the statute of limitations must be clear and unambiguous, and must recognize and be directed to the particular debt and amount to an unqualified admission that it is due and unpaid.” (5 Gen. Dig. U. S., p. 1399, § 526, and authorities cited.)

In *McCormick v. Brown* (36 Cal.), at page 185, the court say: “The acknowledgment must be a direct, distinct, unqualified admission of the debt which the party is liable and willing to pay.”

We think it cannot be contended that the two writings claimed to be acknowledgments and new promises, dated respectively 6-27, 1888, and 7-22, 1888, and set out above, contain any such acknowledgment of this debt, or new promise to pay the same, as to relieve the demand sued on from the bar of the statute. The instrument dated 7-22, 1888, says nothing about this demand. The instrument dated 6-27, 1888, shows that Leighton is not satisfied about the settlement of the Eclipse trip, and asks, "If I (Leighton) settle with your folks, if they will see me clear of Braithwaite," etc. If there is any promise in this, is it not conditional? This certainly does not come within the requirements to take it out of the operation of the statute, even if the instruments were otherwise definite and certain, in which respect it seems fatally defective. Now, as to the first instrument or letter of Leighton, chiefly relied on to take this case out of the statute of limitations, this letter, like the others, is written to one J. D. Biggert, at Pittsburgh. In this letter Leighton seems to complain of Biggert's delay. He says if he does not hear soon, he will go to Bismarck, and tender amount due, as he does not want to be bothered any more. Then he says, "Whatever is due is ready, as it has been for seven years, whenever I can safely pay either you or Braithwaite." Now, what are the legitimate inferences to be drawn from this letter and the others? First, that Leighton was ill, and was anxious to settle this matter in his lifetime; second, that he was willing, and had been for seven years, to pay whatever was due from him, when the amount could be ascertained, and he should know to whom he could safely pay such amount. It is very evident that there was a dispute as to what was due, and to whom it was payable. Leighton seemed anxious to pay when these two important matters were settled. His willingness to pay was evidently conditioned upon the ascertainment of the amount due, and when he was made secure in paying either to the parties represented by Biggert or to Braithwaite. It does not appear that either of these things was ever done, or that Leighton's letter and terms

therein stated were ever accepted or acted upon in any manner by plaintiff or any other party connected with this matter. These conditions should have been shown to have been performed by plaintiff before he seeks the benefit of the alleged new promise to pay. (*Bell v. Morrison*, 1 Pet. 612.) This is not shown to have been done. But plaintiff seems to have disregarded the terms, conditions, and overtures of settlement contained in this alleged new promise, and now, after the death of Leighton, seeks to avail himself of the benefits thereof, as if such conditions were immaterial. We think no other conclusion can be fairly reached from a proper construction of all these letters and alleged new promises to pay. In none of these letters is there an unconditional, definite, certain, and unqualified acknowledgment of this demand, or any certain demand and promise to pay the same. We are therefore of the opinion that these written instruments or letters of Leighton are insufficient to remove the bar of the statute of limitations. So holding, we see no error in the action of the court in holding the complaint bad on demurrer, or that any substantial right of appellant was prejudiced by striking said paragraph 22 from the complaint, as, in our view, the complaint did not, in any event, state facts sufficient to authorize a recovery, for the reason that the demand sued on is barred by the statute of this state.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

HARWOOD and DE WITT, JJ., concur.

Judgment against administrator in another jurisdiction. — When there are different jurisdictions on the estate of the same decedent, each is so far independent of the others that property received under one cannot be sued for under another. *Harrison v. Mahorner*, 14 Ala. 829, 834. In the ancillary forum the administrator cannot be called to account for assets received by him in the domiciliary administration. *Boston v. Boyleston*, 2 Mass. 384; *Campbell v. Sheldon*, 30 Mass. (13 Pick.) 23; *Fay v. Haven*, 44 Mass. (3 Met.) 109, 114. A judgment recovered against an administrator in a state other than that

of his appointment. is not evidence against the estate in the forum of the domicile. *Judy v. Kelly*, 11 Ill. 211, 214; *Reutschler v. Jamison*, 6 Mo. App. 135, 136. Nor will such a judgment subject the land of the decedent in the state in which it is recovered to be taken in execution. *Borden v. Borden*, 5 Mass. 67, 77. And a judgment recovered by or against the administrator appointed in one jurisdiction will not support an action by or against the one appointed in another jurisdiction. *Stacy v. Thrasher*, 47 U. S. (6 How.) 44, 58; *McLean v. Mack*, 59 U. S. (18 How.) 16, 18; *Dent v. Ashley*, Hamps. 54; 7 Fed. Cas. 496; *Judy v. Kelly*, 11 Ill. 211, 214; *Rosenthal v. Remck*, 44 Ill. 202, 207; *Slanter v. Chenowith*, 7 Ind. 211, 212; *Creswell v. Slack*, 68 Iowa, 110, 113; 26 N. W. Rep. 42; *Talmage v. Chapel*, 16 Mass. 71, 73; *Low v. Bartlett*, 90 Mass. (8 All.) 259, 263; *Ela v. Allen*, 95 Mass. (18 All.) 48, 49; *Taylor v. Barron*, 35 N. H. 485, 497; *Brodie v. Bickley*, 2 Rawle, 431, 436; *King v. Clarke*, 2 Hill, Ch. (S. C.) 611, 616. And a judgment in favor of a foreign administrator who has not complied with the statutes authorizing suits by such administrators is not a bar against an ancillary administrator subsequently appointed in the same jurisdiction. *Hatchett v. Berney*, 65 Ala. 39, 49; *Pond v. Makepeace*, 43 Mass. (2 Met.) 114. A decree against the primary administrators in a suit relative to the succession of personal property, conducted in due form and between proper parties, at the place of his domicile is conclusive on an ancillary administrator. *Suarez v. Mayor*, 2 Sand. Ch. (N.Y.) 173; *Churchill v. Prescott*, 3 Bradf. (N.Y.) 233, 238. A judgment in favor of an administrator so merges the debt that it may be treated as his personal effects, so far as to authorize him to maintain suit thereon in another jurisdiction without their taking out letters of administration. *Lewis v. Adams*, 70 Cal. 403; *Barton v. Higgins*, 41 Md. 539; *Talmage v. Chapel*, 16 Mass. 71; *Rircks v. Taylor*, 49 Mass. 552; *Tittman v. Thornton*, 107 Mo. 500, 506. But a distinction is made in the case of different executors appointed by the same will though qualifying in different jurisdictions. *Hill v. Tucker*, 54 U. S. (13 How.) 458, 466; *Goodall v. Tucker*, id. 467; *Grant v. Reese*, 94 N. C. 729, 730.

In the Matter of the Estate of RICHARD HICKMAN,
Deceased.

BRONNER, Public Administrator, *vs.* VICTOR JAHANT, Ex-
ecutor, etc., Respondent.

[109 California, 609.]

CONTESTING PROBATE — PUBLIC ADMINISTRATOR — DEATH OF
SOLE BENEFICIARY.

A public administrator is not a person interested in the estate within the meaning of Code Civil Procedure of California, sections 1907-1912, so as to entitle him to contest the probate of a will.

A will appointing an executor is not rendered void by the death of the sole beneficiary under it.

COMMISSIONERS' decision. Department 2. Appeal from Superior Court, Sacramento county; Matt. F. Johnson, Judge.

In the matter of the estate of Richard Hickman, deceased, Victor Jahant filed a petition for the probate of the last will. George F. Bronner, as public administrator, filed a contest of the probate of said will, and also a petition that letters of administration be granted him. From a judgment denying his petition, as public administrator, for letters of administration, and admitting the will to probate and granting letters testamentary to Victor Jahant, Bronner appeals.

Armstrong, Bruner & Platnauer, for appellant.

Charles H. Oatman, for respondent.

SEARLS, C.—This is an appeal from a judgment of the Superior Court of Sacramento county, in probate, denying the petition of the appellant, as public administrator, for letters of administration, and granting the petition of Victor Jahant for the probate of the last will, and granting

letters testamentary to him, the said Victor Jahant, as executor of the last will of Richard Hickman, deceased.

Richard Hickman died on or about May 5, 1893, in the county of Sacramento, leaving what purported to be a last will, by which he devised and bequeathed all of his estate, real and personal, to his wife, Elizabeth Hickman, subject to the payment of his debts, and appointed Victor Jahant as the executor of such will, to serve without bonds.

Jahant, the executor named, filed a petition for the probate of the will, showing, among other things, estate, real and personal, in the county of Sacramento; that Elizabeth Hickman, the wife, had died; that there were no heirs in Sacramento county; that the next of kin who are heirs, and their residence, were unknown, etc.

Appellant, who is the public administrator of the county of Sacramento, filed a contest of the probate of the will, setting out, among other things, and as evidence of his right to make such contest: (1) That he was public administrator; (2) that the sole legatee and devisee under the will, who was the wife of testator, and not a relative, had died during the lifetime of the testator, whereby the devise and legacy lapsed, and the will became null and void.

He also filed a petition praying to be appointed administrator of the estate. A demurrer was interposed to his contest, which was sustained by the court.

The two applications were heard together, and upon due proof of the execution of the will it was admitted to probate, Victor Jahant appointed executor under the will, and the application of appellant as public administrator to be appointed administrator was denied.

The demurrer was properly sustained. Appellant, as public administrator, had no standing in court to contest the proof of the will. He was not interested in the sense of having an interest in the estate, within the purview of sections 1307-1312 of the Code of Civil Procedure.

In re Sanborn's Estate (98 Cal. 103, 32 Pac. 865), McFARLAND, J., said: "If a public administrator could legally assume the character of a standing contestant of wills,

notwithstanding the wishes of heirs and devisees, he would certainly enlarge the sphere of his activities ; but the limitations of the statute do not allow such inflation."

Sections 1726 to 1743 of the Code of Civil Procedure are not intended to define the cases in which the public administrator is entitled to letters of administration, but to provide for the preservation of the estates of deceased persons until a proper administrator is appointed, as will appear by section 1730, which requires him to deliver the estate over to any person to whom letters testamentary or of administration may be regularly appointed.

The will in question was not invalidated by the death of the beneficiary.

"The mere nomination of an executor, without making any disposition of one's estate, or giving any other directions whatever, will constitute a will, and render it necessary that the instrument be established in the Probate Court." (2 Redf. Wills, p. 59 ; Williams, Ex'rs [7th Ed.] pp. 267, 390 ; Schooler, Wills, § 297.)

The fact that a testator nominates an executor, but without giving a legacy or devising any part of his property, makes it none the less a will.

It may often occur that, subject to the payment of his just debts, a testator is quite willing that his property shall be succeeded to as provided by law, while the selection of the minister through whom the settlement is to be made and the distribution is to be had is not only a matter of deep interest to him, but of vital interest to the estate ; and, as the law accords to him the privilege of making the selection of his executor, it must be upheld, when duly made.

The fact that the sole beneficiary under the will had departed this life prior to the death of the testator, if a fact, was not one to be determined as a preliminary question affecting the probate of the will.

The fact that the document purported to appoint an executor, and provided for the payment of debts, was sufficient to stamp it as a will, and justify its probate as such. (*Jolliffe v. Fanning*, 10 Rich. Law, 186.)

Again, if the will was valid when made, it could only be revoked or altered by a subsequent writing, duly executed, or by obliterating or destroying with intent to revoke. (Civ. Code, § 1292; *In re Tillman's Estate* [Cal.] 31 Pac. 563.)

The court did not err in denying letters of administration to appellant or in granting letters testamentary to respondent. The judgment appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. — For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

FORD, Executor, Appellant, *vs.* FORD AND ANOTHER, Respondents.

FORD, Executor, Respondent, *vs.* FORD, Imp., Appellant.

FORD, Executor, Respondent, *vs.* FORD, by Guardian *ad litem*, Imp., Appellant.

[88 Wisconsin, 122.]

An executor who finds and diligently administers property of the estate in four different states and makes an investigation as to property alleged to have been in a fifth, the estate being in constant litigation for many years, suits for construction of the will being brought, and, with substantially the same result, carried to the courts of last resort in three of the states, is entitled to extra compensation under Rev. St. Wis. 3929, providing for such extra compensation in cases of unusual difficulty or extraordinary services.

The amount of the extra compensation may be fixed at less than the amount testified by all the witnesses as the value of the services, the statute providing for such extra compensation as the court shall judge reasonable.

A claim for extra compensation will not be rejected on appeal on the ground that it was not itemized, the statute not requiring it to be itemized, the rules of court merely requiring it to be set up as a claim in the statement of account, and no motion having been made for a bill of items.

The share of a widow who elects to take the provisions made for her by law, instead of those made by her husband's will, is to be ascertained by deducting from the personal estate, the debts, funeral expenses, allowances and the expenses of administration, including those of probating the will and carrying out its provisions, Sanb. & B. Ann St. (Wis.), section 2172, limiting such share to one-third the net personal estate.

An executor will not be removed for failing to complete the administration within the six years allowed by Rev. St. (Wis.), section 3580, he having used reasonable care and diligence in administering the estate.

A question expressly decided by a judgment of the Circuit Court affirmed on appeal is *res judicata*, though not mentioned in the decision on appeal, it not having been questioned by either party.

The attorney's fees and disbursements of the guardian *ad litem* of an infant in suits for the construction of the will, and concerning the administration, none of which were commenced by or on his behalf, but to which he was a necessary party, are properly allowed out of the estate as part of the expenses of settlement.

APPEAL from Circuit Court, Dane county ; R. G. SIEBECKER, Judge.

Proceedings by J. C. Ford, Margaret G. Ford, Marcus C. Ford, and others in the matter of the estate of Francis F. Ford, deceased. From the judgment J. C. Ford, Margaret G. Ford and Marcus C. Ford appeal.

These are three separate appeals from a judgment of the Circuit Court of Dane county, rendered in the course of the settlement of the estate of Francis F. Ford, deceased. Francis F. Ford died testate, January 26, 1886, leaving property in five states,—Wisconsin, Michigan, Iowa, Kansas, and Missouri. His will was duly admitted to probate in the County Court of Dane county, June 17, 1886, and letters testamentary issued to J. C. Ford. The legatees therein named are his widow, Margaret G. Ford, his only son, Marcus C. Ford, and his three brothers, Edward I., Joseph C., and Henry T. Ford. The will is complicated in its provisions, difficult of construction, and difficult in execution. It was before this court in an action for construction thereof, which will be found reported in 70 Wis. 19, 33 N. W. Rep. 188, where the will is printed at length. Another appeal taken in course of the settlement of the estate, will be found reported in 80 Wis. 565 ; 50 N. W. Rep. 409. The widow duly renounced under the will, and

elected to take the provisions made for her by law. Litigation followed, commencing with a contest of the will by the widow, and litigation has also been carried on in four different states. Ancillary administration has also been taken out in the states of Michigan and Missouri, and that in Missouri was not terminated till after the expiration of six years after the issuance of the letters testamentary by the County Court of Dane county.

On the 18th day of August, 1892, the widow filed a petition in said County Court, asking, among other things, for the removal of the executor and appointment of an administrator *de bonis non* on the ground that six years had elapsed since the granting of letters testamentary, and on the further ground that the executor had failed to properly discharge his duties under the will. The executor answered this petition, claiming that earlier settlement of the estate was impossible, and that he had faithfully discharged his duties. Upon the trial of this issue in the County Court the petition for removal was dismissed, and judgment entered accordingly. From this judgment Margaret G. Ford and Marcus C. Ford appealed to the Circuit Court of Dane county.

October 1, 1892, the executor filed in the Dane County Court his final account and report, and his petition for its allowance. The widow and son thereafter filed a statement in the form of a complaint, making fifteen specific objections to the account, to which complaint and objections the executor made answer. December 12, 1892, the executor filed a supplemental account, bringing his final account down to that date. The County Court tried the issues arising upon the account and the objections, and filed its judgment thereon, February 14, 1893. The widow and son appealed from the whole of such judgment, and the executor appealed from the disallowance of certain items of the account. When the appeal came to the Circuit Court, the executor filed supplemental accounts, bringing down his final account to August 8, 1893.

The appeal in the matter of the application for removal

of the executor, and the various appeals from the judgment rendered upon the final account, were, by stipulation, all heard together in the Circuit Court, and the two proceedings were consolidated, and, after trial, findings and judgment were entered in the Circuit Court, October 30, 1893, as of August 28, 1893. From this judgment separate appeals were taken by the executor, by the widow, and by Marcus C. Ford, which were all argued together in this court.

The executor, in his appeal, claims that the court erred—First, in disallowing \$3,000 of the \$6,000 claimed by him for extraordinary services; second, in disallowing two items of \$200 and \$97.50, respectively, paid by the executor to attorneys for legal services; third, in disallowing three items of \$57.50, \$20.50, and \$28.55, respectively, being certain expenses of the executor to Kansas City and return, and an hotel bill at Madison; fourth, in directing the executor to pay to the counsel for the guardian *ad litem* of Marcus C. Ford the sum of \$1,393.77; fifth, in adjudging that one-half of the net rentals of the estate be assigned to Marcus C. Ford.

The widow, in her appeal, claims that the court erred—First, in allowing any extra compensation to the executor over and above the statutory *per diem* and percentages; second, in not removing the executor, and in holding that he had performed his duties with diligence; third, in first deducting all the expenses of administration from the amount of the personal estate, and assigning to the widow only one-third of the balance; fourth, in not allowing to her the expenses of litigation paid by her in other states as charges against the estate.

The appeal of Marcus makes the same points.

George W. Bird and *I. C. Sloan*, for plaintiff.

B. J. Stevens and *A. L. Sanborn*, for defendants.

WINSLOW, J. (after stating the facts)—1. As to the extra compensation allowed to the executor. The statute pro-

vides (Rev. St. § 3929) that, in addition to his *per diem* and commissions, an executor shall be allowed, as compensation, such further sums, "in cases of unusual difficulty or extraordinary services, as the County Court shall judge reasonable." It seems entirely clear to us that this has been a case of unusual difficulty. We entirely agree with the remarks of the county judge on this subject as follows: "if there ever was a case for extra compensation under our statute, this is one. No reported case that I have seen or been referred to compares with it. In this case there has been property found in four states, and looked after with diligence by the executor. It is claimed that there was and is also property in another state. This required and received investigation at the hands of the executor. He did not see fit to litigate for it. No party in interest, so far as it appears, offered to secure the estate against costs if he would do so. The rights of those entitled to that property have not been waived or lost by the action or nonaction of the executor, so far as appears. The will of the deceased made no reference to such property. The estate has been in constant litigation that has been persistent and spirited during the entire term of the executor's service. But few, if any, steps have been taken by the executor that have not been criticised and questioned. The suits for the construction of the will have been persistently followed, and fought in three states through the courts to the courts of last resort in each, with substantially the same result in all. I therefore find it a case for extra compensation. It is said that the charge for extra compensation was not itemized, and therefore should not be allowed. That the charge was not itemized is an objection to the claim, but full proof has been taken on the subject, and the charge itemized on the trial. I do not think the objection that the charge was not itemized a fatal one."

As to the point that the claim for extra compensation should have been itemized, doubtless such would be the better practice, although no statute seems to require it, and the rule on the subject only requires that it be "set up as

a claim in the statement of account." (County Court Rules of 1879, No. 17, § 6.)

It seems clear that the proper course of the objecting party would have been to move that the claim be itemized, or made more definite and certain, or that a bill of particulars be furnished. Probably, had such a motion been made, it would have been granted. In the absence of such a motion, we would not be justified in rejecting the entire claim now, especially when it appears that it was itemized on the trial.

It is claimed by the executor that the court erred in not allowing \$6,000 as extra compensation, because the evidence of all the witnesses examined on the question of the value of the services fixes such value at that sum or more, and therefore the court acted without evidence in placing the value at \$3,000. We cannot adopt this view. We do not regard this question as standing on the same footing as an action at law for the recovery of the value of services rendered by one person to another. In the present case the court is fixing the value of the labor of its own officer in the transaction of the business of the court. The county judge has necessarily more intimate knowledge of the amount, kind, and worth of the labor performed than any one else. While the evidence of experts is helpful, and proper to be considered, we do not consider it absolutely binding on the court. The statute expressly says that such extra compensation shall be allowed as the "County Court shall judge reasonable." This evidently contemplates that the court shall exercise its sound discretion in the matter, and is not bound to allow exorbitant sums, though there may be evidence uncontradicted which supports such exorbitant charges. The final test is, what does the court, in view of the evidence and its own knowledge of the facts, "judge reasonable?" We think the conclusion reached by the County and Circuit Courts on the question was right.

2. The widow claims that, upon the filing of her election, she became entitled to one-third of the personal property, after first paying debts, funeral expenses, allowances, and

such expenses of administration as would have been incurred had F. F. Ford died intestate, and no more; and that the court erred in deducting from the personalty the expenses of the probate of the will and the actions for the construction thereof, and the actions for procuring partition of real estate, before setting apart her one-third. The last-named expenses constitute the greater part of the expenses deducted. The claim, in brief, is that the widow is entitled to one-third of the personalty after deducting only the expenses of administering an intestate estate, and not the expenses made necessary in probating and carrying out the provisions of the will. This contention cannot prevail. Upon filing her election to take under the provisions made for her by law, instead of the provisions made by the will, the widow becomes entitled "to the same share of his personal estate as if he had died intestate," provided that such share shall not exceed one-third of his net personal estate. (Sanb. & B. Ann. St. § 2172.) Had F. F. Ford died intestate, she would have been entitled to the same share as a child in the residue of the estate after payment of allowances, debts, expenses of administration, and funeral charges. (Rev. St. § 3935, subd. 6.) In this case this share would have been one-half of such residue, because there was but one child. Were there no proviso in section 2172 limiting Mrs. Ford's share to one-third of the "net personal estate," there would certainly be ground for argument that only the debts, allowance, and necessary expenses of administering an intestate estate should be deducted from the personalty before the widow's share should be set apart to her; and that the additional expenses made necessary in order to carry out the provisions of the will should be a charge on the remainder of the personalty after the widow's share had been set apart. The addition of the proviso, however, limiting the widow's share to one-third of the net personal estate, plainly limits and controls the preceding provision, and makes it necessary to determine only what is meant by "his net personal estate." What was the net personal estate left by Francis F. Ford? Clearly it was so

much personal estate as was left after payment of debts, allowances and charges, and all the expenses of administration as well as those expenses which were made necessary by the will as those which would have been incident to the administering of the estate had he died intestate. We see no indication in the statute that the legislature intended the net personal estate should be one sum as to the widow and an entirely different sum as to the children. This would make two different "net personal estates" in the same estate. Had the legislature so intended, it would have been very easy to make the intention clear.

The view we have taken renders it unnecessary to consider a question much discussed on the argument, namely, whether the widow takes her share of the personal estate as heir or by way of dower or in lieu of dower. There is nothing in the cases of *Leach v. Leach*, (65 Wis. 284; 26 N. W. Rep. 754), or *Beem v. Kimberly*, (72 Wis. 343; 39 N. W. Rep. 542), which conflicts with the views above expressed. In neither of these cases was the question as to what sum constituted the "net personal estate" raised or considered.

3. By the will the net annual income of the estate is bequeathed one-quarter to the widow during life, one-quarter to Marcus, one-quarter to Edward Irving Ford, one-eighth each to Joseph C. and Henry T. Ford. By the election of the widow to take under the statute, her one-quarter reverted to the estate. The court below adjudged in effect that the widow's one-fourth went to Marcus, as the owner of the next eventual estate, and that he was therefore entitled to one-half of the net rentals of the estate. The executor claims that the widow's one-quarter should be accumulated into the residuum of the estate. This question is not open for discussion. This question was involved and expressly decided by the Circuit Court in the matter of the allowance to the family, brought to this court by appeal, and reported in *Ford v. Ford*, (80 Wis. 565, 50 N. W. Rep. 409). The findings and judgment of the Circuit Court in that case, as appears from the printed case, were to the effect that Marcus C. Ford is entitled, under the terms of the

will, to one-half of the net income of the estate which is still under the operation of the will. This does not appear in the report of the case, because it was not excepted to nor appealed from by either party, but the entire judgment was affirmed by this court November 17, 1891. It is consequently *res adjudicata*.

4. In the executor's second and third assignments of error he complains of the disallowance of a number of items of attorney's fees and incidental expenses. Some of these were disallowed because incurred in the course of a personal action brought by the widow against the executor, and some because not necessarily incurred. After examination of the record, we think the items were properly disallowed.

5. The Circuit and County Courts both found that the executor had used all reasonable care and diligence in administering the estate, and that it had been impossible to complete the administration thereof within the six years allowed by the statute (Rev. St. § 3850), and therefore refused to remove the executor and appoint an administrator *de bonus non*. It was said in *Scott v. West*, (63 Wis. 529, 24 N. W. Rep. 161, and 25 N. W. Rep. 18), that an estate is to be administered according to the will, even though a final settlement within six years is thereby rendered impossible. This principle seems decisive of this case, and we hold that under the facts shown the refusal to remove the executor was right.

6. In his fourth assignment of error the executor complains because the Circuit Court inserted in the account, and allowed as part of the expenses of administration, a bill of attorney's fees and disbursements incurred by the guardian *ad litem* of Marcus in the course of the litigation in this state, and in an action brought for construction of the will in Michigan. None of this litigation was commenced by or on behalf of the minor, but he was a necessary party thereto, and his guardian *ad litem* would have failed in his duty had he not employed counsel to defend and enforce the rights of the minor. He was a ward of

the court. He had no property except his prospective interest in the estate, and we think the expenses so incurred stood on the same ground as the compensation of the guardian *ad litem*, and were rightly allowed, not as costs, but as a part of the expenses of settlement of the estate. The expenses incurred by the widow in this litigation, much of which she herself commenced, do not stand on the same footing, and were properly disallowed.

As to all objections on the part of either appellant which have not herein been specifically considered, we think the conclusions of the trial court were right. The taxable costs of each party in this court may be taxed and paid out of the estate.

Judgment affirmed on all of the appeals.

PINNEY, J. took no part.

BATEMAN, in Error *vs.* REITLER, Administrator, etc., Defendants in Error.

[19 Colorado, 547.]

SALE OF LANDS—PETITION—SUFFICIENCY—CONCLUSIVENESS
OF FINDING.

A petition for the sale of land to pay debts shows the insufficiency of the personalty and the necessity for the sale if it discloses the value of the personal property and contains a statement of the claims and costs allowed against the estate to an amount exceeding the value of the personalty.

The fact that a petition for a resale instead of setting out these facts refers therefor to the original petition is, at best, an irregularity and the objection is not available collaterally in an action to set aside the sale.

A finding in an order for the sale of decedent's interest in real estate as to the necessity therefor, is on an application to set aside the sale of the entire property conclusive, on one who was a party to the proceeding.

ERROR to District Court, Arapahoe County.

Action by Elizabeth Bateman against Charles W. Reitler, administrator, and others, to set aside an administrator's

sale, and for other relief. Judgment for defendants upon demurrer to the complaint. Plaintiff brings error.

The plaintiff, in her complaint, alleges, *inter alia*, that on the 9th day of November, 1884, in the county of Jefferson, state of Colorado, Robert Standring died seised and possessed of an undivided one-half interest in certain real and personal property; that the said Standring left surviving him, as his sole heir, his wife, Maria Standring; that shortly after the decease of Robert Standring, and on the same day, his wife departed this life; that at the time of the death of Mrs. Standring, she was the sole owner of the other undivided one-half interest in the property heretofore mentioned, and also, as the heir-at-law of Robert Standring, she died seised and possessed, and the owner, of the property of which her husband died seised.

That both Mr. and Mrs. Standring died intestate, and left surviving them no children; that the plaintiff, Elizabeth Bateman, is the sister of said Maria Standring, deceased, and, at the time of said Maria Standring's death, was her sole heir-at-law.

The complaint further alleges the appointment of Charles W. Reitler as administrator of the estates of the Standrings, deceased, his subsequent qualification, and entering upon his duties, as such administrator; that as such administrator, in the month of August, 1885, he began proceedings in the County Court to sell the real estate to pay debts, in both of the estates. In the first of these suits Elizabeth Bateman was made the sole defendant, and in the second the parties defendant were Margaret Hill Standring and others, alleged heirs-at-law of Robert Standring, deceased.

In this petition it is alleged that Robert Standring and Maria Standring were husband and wife, and departed this life on the 9th day of November, 1884. The amount and value of the personal estate is given, according to inventory and appraisement thereof; the sale of the personal estate, and the amount received from said sale; the amount of debts and claims allowed against the estate, and the amount still existing, and not allowed, so far as known,

with a particular description of the whole of the real estate whereof deceased died seised, and such interest, claim and right as decedent had at the time of her decease; the nature of this claim, right and title; the nature and value of the several parcels of real estate, and the nature and amount of incumbrances thereon, together with a statement of the condition of said estate, and making reference to certain exhibits for details. The whole concluded with a prayer for the aid of the court in the premises. It is further alleged that Mrs. Bateman, was not a party to the petition filed in the Robert Standring estate, nor served with process therein, nor had notice thereof; that later in the year 1885 the County Court made an order in both cases directing the sale of the real estate, and that said administrator sold pursuant to such orders, but that such sale was thereafter disapproved by the court, and set aside.

That in March, 1886, the administrator filed petitions to resell the property mentioned. These direct the attention of the court to the proceedings pending, after setting out the condition of the real and personal property up to date, and pray a resale of the premises. On the 24th of August, 1886, the County Court, on said petitions, ordered a resale of both estates; and a copy of said order is set out in the complaint, as entered in the proceedings in the estate of said Maria Standring, deceased, which, in substance, authorizes the administrator, if he can obtain a higher price therefor, to sell the interest of said Maria Standring in said realty jointly with the interest of said Robert Standring. The order fixes the place and notice of such sale, and the petition also alleges the due publication for the required time of the notices of sale.

It is further alleged that on the 31st day of July, 1886, the administrator, pursuant to the order and notice, sold the entire interest of said Maria Standring, deceased, jointly with the interest of said Robert Standring, deceased, in the property mentioned in said petitions; that the defendant Samuel Lesem purchased at said sale lots 19 and 20, block 82, for \$2,800; that the defendant James H. Hart

purchased at the sale lots 17 and 18, block 82, for \$3,300; that these sales were approved by the court on the 18th day of September, 1886; and that on the 20th of September, 1886, the administrator delivered deeds to the purchasers for the property. The complaint also alleges certain subsequent conveyances of a portion of the property to others.

To the complaint the defendants filed a demurrer, assigning the following causes of demurrer:

First. That the complaint does not state facts sufficient to constitute a cause of action.

Second. That the complaint shows upon its face that the matters relied upon were *res judicata*.

Third. That the plaintiff is barred by her own neglect, for delay and *laches*, from bringing and taking this action.

W. J. Edwards, for plaintiff in error.

A. B. Seaman, Markham & Carr, and *Robert E. Foot*, for defendants in error.

Chief Justice HAYT delivered the opinion of the court. This is a collateral, as distinguished from a direct, proceeding, by appeal or writ of error, attacking the judgments or orders of sale of the County Court of Jefferson county,—a court of general jurisdiction, and having particularly in charge the administration of estates.

If the court administering upon the estates had jurisdiction of the subject-matter and of the parties, its orders and judgments are not open to attack in this proceeding. Moreover, even where the attack is direct, upon appeal or writ of error, "public policy and common justice require that judgments of courts of record, of long standing, and upon the faith of which property rights have been acquired, should not be disturbed, except for the most manifest error." (*Sloan v. Strickler*, 12 Colo. 179; 20 Pac. Rep. 611.)

In this instance the property was sold twice, and the fact that the court, after setting aside the first sale, ordered a

resale upon a motion or petition, referring to the previous petition for many of the facts relied upon, was, at most, a mere irregularity, and not open to attack in this proceeding. The statute under which the proceedings were had in the County Court requires, in case the executor or administrator desires to sell the real estate of a decedent, that he shall present a petition setting forth—

First. "The amount and value of the personal estate, according to the inventory and appraisement thereof, and if sale has been made of such personal estate, the amount received from such sale."

Second. "The amount of debts and claims allowed against the estate and the amount still existing and not allowed, so far as the same may be known."

Third. "The amount of legacies, if any, for the payment of which resort must be had to the real estate, and describing particularly the whole of the real estate whereof the decedent died seised, or in or to which he or she, at the time of his or her decease, had any interest claim or right."

Fourth. "The nature of his or her claim, right or title."

Fifth. "The nature and value of the several parcels of such real estate respectively, and if the same or any thereof are encumbered, the nature and amount of such encumbrance, and pray the aid of the court in the premises."

It is claimed in this case that the petition filed in the matter of the estate of Maria Standring, deceased, does not show either the insufficiency of the personal property to pay the debts and charges against the estate, or a necessity for the sale of the real property, or any portion thereof. The petition does in fact disclose the nature, extent and value of all the personal property belonging to the estate, and contains a detailed statement of facts from which it sufficiently appears that the personal property is not sufficient to meet the claims and costs allowed against the estate; and, consequently, it does show the necessity for resort to the real property. The case is unlike the case of *Haynes v. Meeks* (20 Cal. 288), relied upon by counsel. In that case there was no attempt to comply with the statute

with respect to either the personal or real property. It also appeared that the administrator making the sale was never legally appointed to the position, and was not at the time entitled to act in such capacity. Moreover, plaintiff in error was a party to the proceedings resulting in the sale of the one-half interest in the property standing of record in the name of Maria Standring, deceased. She appeared and answered, and is bound by the findings and judgment of the court. (*Grignon's Lessee v. Astor*, 2 How. 319.)

The order of sale in that case is conclusive as to such interest in this. It contains the following *inter alia*:

"This matter coming on to be heard upon the petition of Charles W. Reitler, administrator of the estate of Maria Standring, deceased, and the answer of the defendant, Elizabeth Bateman, thereto, and the court being fully advised in the premises, after argument of counsel on behalf of plaintiff and defendant, and it appearing to the court that said petition asks for leave to resell the real estate of said deceased, more fully described and set out in the petition filed by said administrator for the sale of said real estate to pay the debts of said decedent and the expenses of administration of said estate, and it further appearing to the court that the sale of said premises made by said administrator under the decree of this court duly made and entered on the 16th day of December, 1885, was set aside, and the report of said sale by said administrator made of his doings and proceedings under such decree was not confirmed, and it further appearing to the court that the necessity still exists that the said interests of said deceased in said real estate be resold to pay the debts of said deceased, and the expenses of administration, and it further appearing to the court that the personal estate of said deceased is not sufficient as it now appears, by the sum of \$2,975.85, to pay the debts against such estate, and expenses of administration, and that all the facts and material allegation set out in said decree and petition still appear and exist."

As to the undivided interest standing in the name of Robert Standring at the time of his death, the claim of

plaintiff is that Maria Standring survived the death of her husband a brief period, and that, as such survivor, the real estate held by him descended to his wife, as the sole heir at law, and that upon Mrs. Standring's death the whole estate passed to her sister, the plaintiff in error.

The petitions for the sale of the realty were filed in both estates at the same time, and great care is manifested throughout the proceedings. The petitioner, evidently desirous of complying with the statute in every particular, made the living heirs of Robert Standring, so far as known parties defendant in the proceeding with respect to the realty standing in his name at the time of his death, while in the estate of Maria Standring, plaintiff in error Elizabeth Bateman, was made the sole defendant. At the time it was not known who died first, — Robert or Maria, — and the court administered the estate as separate estates, leaving the question of survivorship to be thereafter determined.

If it be conceded that plaintiff in error should have been made a party defendant *in re* the estate of Robert Standring, she still has no standing in a Court of Equity upon the present bill. She was of legal age at the time the estates were in process of administration; she was a party defendant in a proceeding in which an undivided one-half interest in the property was sold; the sales were made at the same time; thead vertisements were inserted contemporaneously, and both interests were offered for sale, and sold together at public auction, — all of which must have been known to plaintiff in error.

If she was entitled to the portion owned by Robert Standring at the time of his demise, she should have set up such claim. Instead of doing this, she waited nearly four years after the confirmation of the sale before asserting such claim. In the mean time a portion of the property had been deeded by the purchasers, and third parties had paid out large sums upon the faith of the order of the court. During all this time the purchasers had been in possession, presumably paying taxes upon the property, or otherwise it would have been sold for taxes. In this new country the

value of city property fluctuates continually, and parties claiming title thereto cannot be allowed, with full information, to remain silent for years, while interested parties invest on the strength of a title apparently perfect.

To allow plaintiff in error to maintain this suit would be a manifest injustice, and a fraud upon the rights of the defendants. By a familiar principle, a party who is guilty of laches or unreasonable delay in asserting his rights must be denied equitable relief. The authorities are believed to be uniform upon this question. (*Great West Min. Co. v. Woodmas of Alston Min. Co.*, 14 Colo. 90; 23 Pac. Rep. 908; *Dunne v. Stotesbury*, 16 Colo. 89; 26 Pac. Rep. 333; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 343; *Ford v. Loomis*, 33 Mich. 121; 2 Herm. Estop. §§ 939, 951, 1063, 1221.)

The judgment of the District Court will be affirmed.

HUNKYPILLAR vs. C. W. HARRISON.

[59 Arkansas, 458.]

DEVISE AND LEGACY—ACCEPTANCE—LIABILITY FOR ANNUITY.

The acceptance of a bequest is sufficiently shown by the devisee defending, as administrator and devisee, a suit brought to set aside a conveyance to the testator, receiving the amount awarded as due to the estate and not accounting for it as administrator, and by making payments on account of an annuity charged against the bequest, the only evidence of non-acceptance being the testimony of his attorney that by his advise, the bequest had never been accepted.

A devisee is not personally liable for an annuity which he is directed by the will to pay out of the proceeds of the estate.

APPEAL from Circuit Court, Jefferson county.

Action by Mary L. C. Hunkypillar against C. W. Harrison, administrator of F. W. Pinchback. There was a judgment for defendant, and plaintiff appeals.

S. M. Taylor and J. W. Crawford, for appellant.

Bridges & Wooldridge, for appellee.

BUNN, C. J. Mary J. Pinchback, wife of Frank White Pinchback, died in Jefferson county in November, 1878, having made a will, of which the following is a copy of all that affects this case, to wit :

“Item 1st. I hereby bequeath to my husband, Frank White Pinchback, all my real estate, also all my personal property, including all notes or other evidences of indebtedness, which I now hold or may accrue to the estate ; this provision in my will being that he, my husband, carry out my wishes as follows : That Frank White Pinchback, my husband, is to educate and support my niece Mary Lula Crowell until she arrives at the age of twenty-one years ; he paying out of the proceeds of my property, personal or real, the sum of two hundred and fifty dollars per annum in United States currency, or any money which is a legal tender.”

The will was duly probated in the Jefferson Probate Court, and Frank White Pinchback was appointed administrator with the will annexed ; and he proceeded to administer, and filed two annual settlements, which were duly approved, leaving a balance in his hands of \$360, but he never made a final settlement.

All the real estate left by Mary J. Pinchback was acquired by her from the estate of B. K. Crowell, deceased, her former husband ; and in July, 1879, the heirs of said B. K. Crowell instituted their suit in the Jefferson Chancery Court against Frank White Pinchback and others interested, to set aside the conveyance by which Mary J. Pinchback held the lands of her said former husband, for fraud in their procurement, and to divest her estate of the same. This suit was successful, and decree rendered accordingly. In the adjustment of the matters between Mary J. Pinchback, and the estate of B. K. Crowell, however, the chancellor decreed an allowance to Frank White

Pinchback, who answered for his wife's estate, both as administrator and legatee, the sum of \$1,864.01 principal and \$24.53 interest, which was subsequently paid to him, and which seems never to have been accounted for by him as administrator.

Frank W. Pinchback never paid anything to the annuitant, Mary Lula Crowell, who subsequently married and became Mary Lula Crowell Hunkypillar, and is the plaintiff in this proceeding. In September, 1886, Frank White Pinchback died intestate, and J. W. Cox was appointed his administrator by the Jefferson Probate Court; and the appellant made out, duly verified, and presented her account of amounts due from Frank White Pinchback, as legatee of his wife and her aunt aforesaid, on said annuity, for allowance and probate against his estate. The administrator disallowed her claim, and in due course the same was heard in the Probate Court, on the response of the administrator and the evidence, and the claim was again disallowed, and the claimant appealed to the Jefferson Circuit Court, where, on the same state of facts as in the Probate Court, the Circuit Court also disallowed her claim; and the matter, on bill of exceptions, and otherwise in form, comes to this court on appeal.

The case presented to us is on exception to the findings and judgment of the Circuit Court, to wit: Because the Circuit Court found that Frank White Pinchback never in fact accepted the devise of his wife, and therefore was not bound to appellant in any sense. Second. Because said court refused to declare the law of the case to be as asked by appellant, to wit: "(1) Where a will gives all the testator's real and personal estate to a person, and declares the donee is to pay all the testator's debts and a certain annuity, the acceptance of the gift creates a personal liability in favor of the annuitant, upon which an action at law can be maintained, without any special promise. (2) If Frank Pinchback accepted the legacy or devise under the will of Mary J. Pinchback, and took possession, he or his estate must pay the annuity to the plaintiff, Hunkypillar,

even though the amount he received is insufficient for that purpose. (3) If Frank Pinchback, as devisee or legatee, received anything under the will of Mary J. Pinchback, her administrator cannot defeat the action of the plaintiff by showing that the estate of Mary J. Pinchback has never been finally closed, and the administrator discharged."

The evidence adduced to show an acceptance on the part of Frank White Pinckback of the devise was to the effect that he had received the \$1,864.01 principal and \$24.53 interest belonging to the estate of the testatrix as an individual, and had never accounted for the same as her administrator; that he had answered the complaint of the heirs of B. K. Crowell in his character as legatee, and had so received the proceeds of that suit coming to his deceased wife, the testatrix; that he had paid one or two payments on another annuity provided for; that in such ways he had held himself out as such legatee. The controverting evidence was that of his attorney, who simply testified that Pinchback had never accepted the legacy by his advice.

A majority of this court are of the opinion that there was an acceptance of the devise on the part of Frank White Pinchback, and in so far and for that reason, among others, the judgment of the Circuit Court is reversed.

On the declarations of law asked by plaintiff, and refused by the court below, the opinion of this court is as follows, to wit:

The general rule by which the rights and liabilities of a devisee who has accepted a devise of lands with conditions attached is thus stated in *Brown v. Knapps*, (79 N. Y. 143): "It is well settled that when a legacy is given, and is directed to be paid by a person to whom real estate is devised, such real estate is charged with the payment of the legacy. And the rule is the same when the legacy is directed to be paid by the executor, who is the devisee of real estate. If the devisee, in such case, accepts the devise, he becomes personally bound to pay the legacy, and he becomes thus bound even if the land devised to him proves

to be less in value than the amount of the legacy." To the same effect is *Williams v. Nichol*, (47 Ark. 268; 1 S. W. Rep. 243); *Millington v. Hill*, (47 Ark. 301; 1 S. W. Rep. 547); *Porter v. Jackson*, (95 Ind. 210); *Birdsall v. Hewlett*, (1 Paige, 32); *Glen v. Fisher*, (6 Johns. Ch. 33); *Van Order v. Van Order*, (10 Johns. 30.) The origin and application of the general rule is exhaustively discussed in an article in the Albany Law Journal (No. 10, vol. 44, p. 183. Sept. 5, 1891) by Judge W. J. GAYNOR, wherein all the leading authorities to that date are collected.

This rule is not confined in its application to cases growing out of the disposition of property by will, but is applicable alike to all cases where property and property rights are transmitted from one person to another with conditions or incumbrances that affect third persons, or the parties to the transaction. All, in such cases, take *cum onere*. All accept the benefits with the obligation imposed by the conditions or charges of which they at the time have, or are reasonably bound to take, notice.

But in the case of wills this rule, of such general application, is necessarily qualified in some respects by another, of less general application, it is true, but for that very reason, among others, the less yielding in its nature. This second rule is stated thus in *Worth v. Worth*, (95 N. C. 239): "In the construction of testamentary disposition of property, the primary purpose should be to ascertain and give effect, as far as allowable by law, to the testator's meaning; and this is to be found within the written instrument itself, in the light of surrounding circumstances. No outside evidence of that intention, furnished by his contemporary or other declaration, is receivable."

There are innumerable instances in which the testators, in making devises with charges thereon, have, in terms, given direction as to what manner, and out of what funds, the general devise is to pay off the special legacies made a charge upon the property devised. In all these cases the personal liability of the devisee is more or less affected, even to the extent, in many cases, of being entirely want-

ing. And this is so simply from the fact that the obvious meaning of the testator, as gathered from the language of the will in each case, is to the effect that he does not wish the devisee to pay the special legacy at all events, but only as far as the property devised to him will enable him to do. This principle is illustrated in numberless cases. Thus, in *Hayes v. Sykes*, (Ind. Sup. 21 N. E. Rep. 1080), the following provision of a will was under consideration in the Supreme Court of Indiana, to wit: "I will that, in case there is not money enough in the hands of the executor of my father's will to pay all my just debts, I then devise that the property herein devised to my wife Anna, and to my mother, Mary Ann Sykes, shall be held liable, in equal proportion, to pay the same; and to this end I make a charge upon my estate so devised, to perform the same."

Here is a charge upon two legacies to pay debts, and under the general rule first referred to, and as insisted upon by the claimant in that case, the legatees would be personally bound to pay these debts, whether the property devised to them is sufficient or not. But the court, from a consideration of the language of the will, held the real and true meaning of the testator to be otherwise, and therefore it said: "It is not our opinion that the devisees became personally liable because of their acceptance of the devise made to them by the will. They took title to the real estate subject to the incumbrances and charge that were placed upon it." It was then because the will, in terms, otherwise directed, that the devisees in that case were not personally liable to pay the debts, as they would have been under the more general rule. This idea that the general rule is subject to the intention of the testator is expressed in the cases referred to in note on page 1246, Pom. Eq. Jur.; in *Eskridge v. Farrar*, (34 La. Ann. 721); in *Nudd v. Powers*, (136 Mass. 273); in *Commons v. Commons*, (115 Ind. 162; 16 N. E. Rep. 820, and 17 N. E. Rep. 271). The principle is illustrated in *Hancock v. Fleming*, (103 Ind. 533; 3 N. E. Rep. 254), in which it is said that a purchaser of land incumbered by mortgage is personally bound, or not, for

the mortgage debt, according to the meaning of the language of the instrument by which he holds.

Now, the language of the will in this case, which provides for the annuity sued for, is, "He (F. W. Pinchback) paying out of the proceeds of my property, personal and real, the sum of two hundred and fifty dollars per annum." If Pinchback is to pay the annuity out of the proceeds of the property devised to him, it is plain that his devisor did not intend that he should pay it out of any other fund. Evidently she did not intend to bind him to pay out of his own funds any deficiency created by a lack of funds devised to him by her. She plainly never intended to compel him to become a co-benefactor with herself, of her niece. Nor did she make her devise to him conditional upon his payment of the annuity at all events, or otherwise than out of the proceeds of the property devised. We think the facts in this case, whatever may be the rule in other cases, do not show F. W. Pinchback to be personally liable for the payment of the annuity sued for, but that he was, and his estate is, liable to the extent of funds in his hands at his death, or which have come to his estate since, from the estate of his deceased wife, subject, however, to the claims of creditors duly and in due time probated, and which are still valid and subsisting claims, and also subject to the claims of other annuitants and legatees other than the said Pinchback, in so far as they have preference of, or stand on equal footing with, that of the appellant.

Wherein the declarations of law asked by appellant, and refused by the court below, are inconsistent with this opinion, the judgment of the court below in refusing same is affirmed, and where otherwise the refusal of the court is not sustained. The findings and judgment of the court below are reversed as aforesaid, and the cause is remanded for further proceedings not inconsistent herewith.

Wood, J., not participating.

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- By direction to devisee to pay legacy. *Williams v. Nichols*, V, 43.
- By direction to pay specified sum to devisee before any other bequests are paid. *Le Fevre v. Toole*, II, 403.
- By gift to son of all the real and personal property, he to pay debts and the school expenses of a younger brother. *Thayer v. Finnegan*, III, 360.

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- Construction of, of public nature, liberal. *Hunt v. Fowler*, VI, 444.
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- that trustees of private library shall not exclude any book because differing from conventional notions. *Manners v. Philadelphia Lib. Co.*, II, 267.
- to devote residue for charitable purposes, masses, etc. *Matter of Schouler*, III, 249.
- to disburse to such persons and objects as executrix deems proper, such sums as she pleases, not to exceed a specified sum. *Bristol v. Bristol*, V, 332.
- Failure of trustee to select beneficiary will not defeat. *Minot v. Baker*, VII, 43.
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- Municipal corporation may be compelled to execute charitable trust on which it holds property. *Peynado v. Peynado*, V, 483.
- Neglect or refusal of trustee to execute power will not defeat. *Mills v. Newberry*, V, 318.
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- Suppression of manufacture, etc., liquors. *Haines v. Allen*, II, 242.
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- A bequest to a corporation established for certain purposes will not pass to another corporation established for almost similar purposes, even though there is no other corporation in existence that can take the legacy. *Riker v. Leo*, VII, 580.
- Corporation legatee improperly described, parol evidence admissible. *Hinckley v. Thatcher*, IV, 483; *Webster v. Morris*, V, 158; *The University v. Tucker*, VI, 597.
- Omro and Algoma Union Cemetery Association for Union Cemetery Association. *Webster v. Morris*, V, 158.
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— Certainty.

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- Indigent, unmarried, Protestant females over the age of eighteen and residents of a specified city. *Tappan's Appeal*, V, 193.
- Officers of Freedman's Association, there being no society of that name. *Fairfield v. Lawson*, IV, 36.
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- Worthy and unfortunate poor. *Dascomb v. Martin*, VI, 248.
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— within time to contest will. *Watson v. Turner*, VII, 15.

Republication of will. *Hatcher v. Hatcher*, V, 439; *Barney v. Hays*, VIII, 19.

— except as it changes it. *Brown v. Clark*, I, 510.

— construed as if executed at same time. *Caulfield v. Sullivan*, II, 48.

— cures want of mental capacity at time of executing will. *Brown v. Riggis*, I, 238.

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What Is.

- Conveyance to be delivered after death. *Kelley v. Richardson*, VIII, 397.
 Letter mentioned in holographic will, but not yet written. *In re Shellaber*, VI, 70.
 Paper written and signed by testator and folded in holographic will. *Perkins v. Jones*, VI, 124.

Construction.

- Property given by, when not subject to trust created by will. *Buchanan v. Lloyd*, V, 30; *Reid v. Walbach*, VIII, 131.
 — to directions in will as to "property heretofore given." *Reid v. Walbach*, VIII, 131.
 As revocation of and substitute for specific clause of will. *Kelly v. Richardson*, VIII, 397.
 Co-executor appointed by, when, not co-trustee. *Simpson v. Cook*, I, 27.
 Gift in, not advancement within meaning of will. *In re Zeile*, VI, 103.
 Not "part of this will." *Huston v. Read*, I, 501; *Sloane v. Stevens*, VI, 1.
 Reduction of one of two devises by, effect on other. *Sturgis v. Work*, VII, 23.
 Referring to two different wills. *Bradish v. McClellan*, III, 201.
 Residuary clause in, prevails over residuary clause in will. *Sturgis v. Work*, VII, 23.

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- By infant on judgment confirming sale of land. *Palmerton v. Hoop*, VIII, 222.
 Evidence as to jurisdictional allegations insufficient. *Morford v. Dffenbach*, V, 135.
 On authentication of record of foreign probate. *Calloway v. Cooley*, VIII, 360.
 On grant of administration; on estate of person living. *Devlin v. Commonwealth*, IV, 76; *Thomas v. People*, IV, 284.
 — on ground of want of assets. *Estate of Moore v. Moore*, VIII, 100.
 — presumption as to domicile and assets. *Lyne v. Sanford*, VIII, 26.
 On judgment confirming sale of land to pay debts. *Palmerton v. Hoop*, VIII, 222.
 On orders and proceedings of probate court. *Shelton v. Hadlock*, VIII, 289.
 On probate of will. *Piper v. Moulton*, II, 574.
 — and record. *Corrigan v. Jones*, VII, 582.
 — for failure to give statutory notice. *Dickey v. Vann*, VI, 47.
 On sale of land to pay debts. *Lyne v. Sanford*, VIII, 26.
 On settlement of administrator. *Nelson v. Barnett*, VIII, 559.
 On title of purchaser at administrator's sale. *Ackerson v. Orchard*, VIII, 525.
 On validity of divorce, in suit to establish legitimation of child. *Adams v. Adams*, VIII, 1.
 Record showing absence of facts essential to jurisdiction. *Potter v. Ogden*, VIII, 364.

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See, also, **COMPENSATION.**

On any personal property coming to hand that has a money value. *Pomeroy v. Mills*, III, 565.

On debts of ward paid to guardian's firm. *Burke v. Turner*, II, 489.

On debts specifically bequeathed to executrix. *Handy v. Collins*, III, 570.

On value of stock sold by testator's brokers to repay advances. *Pomeroy v. Mills*, III, 565.

On money used by guardian in own business. *Burke v. Turner*, II, 489.

On value of fee, not unless vested with it. *Phœnix v. Livingston*, IV, 570.

Only for what has been done, not for what may be requisite to fully execute will. *Pomeroy v. Mills*, III, 565.

Double commissions.

Same person executor and trustee. *Hall v. Hall*, I, 817.

— on share paid to legatee before accounting. *Hall v. Hall*, I, 817.

— functions coexisting during entire period. *Johnson v. Lawrence*, IV, 328.

— will contemplating severance of duties. *Phœnix v. Livingston*, IV, 570.

COMMUNITY PROPERTY.

Insurance on life of husband payable to wife. *Evans v. Opperman*, V, 550.

COMPENSATION.

See, also, **COMMISSIONS.**

Agreement between trustee and *cestui que trust sui juris*. *Bowker v. Pierce*, II, 109.

Amount fixed at less than value as testified by witnesses. *Ford v. Ford*, VIII, 589.

Extra compensation, allowance of. *Ford v. Ford*, VIII, 589.

— claim for, itemizing. *Ford v. Ford*, VIII, 589.

— for work outside of executorial duties. *Lent v. Howard*, III, 109.

Right to, not such interest as to disqualify as attesting witness. *Stewart v. Harriman*, I, 95.

Waiver of further claim by acceptance of sum in full. *Matter of Hodgman*, VIII, 472.

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See, also, **ACCORD AND SATISFACTION.**

By guardian of infant legatee not a bar. *Culp v. Lee*, VIII, 128.

Demand accruing in life time of decedent. *Ætna Life Ins. Co. v. Swayze*, III, 585.

Legal right of executors and administrators. *Moulton v. Holmes*, II, 546.

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CONCEALMENT OF WILL.

Effect of, on statute of limitations. *Drake, Appellant*. VI, 217.

CONDITIONS.

See, also, **CONDITION IN RESTRAINT OF MARRIAGE.**

As to death before settlement of estate. *Calkins v. Smith*, I, 154.

Not favored when they defeat estates. *Calkins v. Smith*, I, 154.

Subsequent performance impossible. *Hammond v. Hammond*, II, 119.

Performance.

Income to institution on condition of caring for certain person and principal at his death, offer to care for him though previously expelled. *Livingston v. Gordon*, II, 356.

For payment of legacy out of funds of devisee, not by payment out of funds of estate in his hands. *Nevins v. Gourley*, I, 53.

— by note accepted by legatee. *Nevins v. Gourley*, I, 53.

Non-performance of conditions precedent. *Mills v. Newberry*, V, 318.

— strict performance necessary. *Nevins v. Gourley*, I, 53.

Of reconciliation with certain persons, how performed. *Page v. Frazer's Exors.*, I, 58.

That legatee make good use of his money. *Pedrick v. Pedrick*, VIII, 425.

Construction.

Death of legatee without heirs. *Franklin v. Franklin*, VIII, 184.

Death, or death without issue, means in lifetime of testator. *Mickley's Appeal*, I, 615.

— though enjoyment postponed. *Tienken v. Tienken*, VIII, 157.

— without leaving such issue living at the time. *Piatt v. Sinton*, II, 380.

For support and education of children out of and from property bequeathed. *Estate of Oertle*, V, 398.

Invalid condition subsequent, bequest discharged of. *Piper v. Moulton*, II, 574.

What is.

Bequest "to be in lieu of dower, and if she shall refuse, she shall be entitled to have only her right of dower." *Card v. Alexander*, II, 397.

Devise in consideration of care of testator during rest of his life. *Martin v. Martin*, II, 220.

Devise to one at death of his mother "by him seeing to her." *McNeely v. McNeely*, I, 585.

Direction that devisee pay fifty dollars yearly to daughter. *Crawford v. Thompson*, IV, 57.

— that person be not disturbed in possession of place, if he pays interest annually on what he owes. *Garland v. Garland*, II, 848.

CONDITIONS—(Continued).

— that trustees of private library shall not exclude books because differing from conventional notions. *Manners v. Philadelphia Library Co.*, II, 267.

Remainder limited on devise to husband if he survived testatrix. *Gibson v. Seymour*, IV, 517.

Condition Precedent.

Devise "for the consideration" amongst other things, that the devisee support certain persons. *Armstrong v. Armstrong*, I, 206.

Of becoming reconciled to certain persons within specified time, with devise over if not so reconciled. *Pager v. Frazer's Ex'rs*, I, 588.

To pay legacies and settle estate within one year from death of testator, otherwise to have no lien. *Nevins v. Gourley*, I, 58.

Condition Subsequent.

Bequest "for that he shall look after and take care of brother while he shall live and bury him at his death." *Hammond v. Hammond*, II, 119.

Bequest to town to establish a school fund on condition that town accept and perform condition of another bequest. *Piper v. Moulton*, II, 574.

To pay income to certain institution as long as it cared for certain person, and principal of it cared for him during his entire life. *Livingston v. Gordon*, II, 356.

A limitation over on devise in fee, that if the devisee should die without leaving a will. *Moore v. Sanders*, II, 245.

Validity.

Avoiding provisions of will without limitation over. *Phillips v. Ferguson*, VII, 460.

Bequest to pay to certain institution income so long as it cared for certain person and principal if it cared for him for life, and if not properly maintained, income to such other institution as that person should select and principal to whatever institution was maintaining him at time of his death. *Livingston v. Gordon*, II, 356.

Limitation over on a devise in fee, if the devisee should die without leaving a will. *Moore v. Sanders*, II, 245.

Of occupancy by life tenant. *Conger v. Lowe*, VII, 139.

That legatee shall have learned some useful trade, business or profession and is of good moral character; executors to determine. *Webster v. Morris*, V, 158.

That devisee be educated in Roman Catholic school and raised in that faith. *Magee v. O'Neil*, III, 591.

That devisee withdraw from priesthood of specified church, or from any society connected therewith and refrain from forming any such connection. *Barnum v. City of Baltimore*, IV, 291.

CONDITIONS—(Continued).

That within one year after husband's death devisee becomes reconciled to certain persons with devise over if not so reconciled. *Page v. Frazer's Ex'rs.*, I, 588.

That devisees should not sell until ten years after one became of age, except to one another, and not mortgage. *Anderson v. Cary*, II, 137.

CONDITION IN RESTRAINT OF MARRIAGE.

See, also, **CONDITIONS**.

What is.

Devise "during natural life or widowhood." *Stillwell v. Knapp*, I, 211.

Devise "so long as she shall remain my widow." *Hibbits v. Jack*, IV, 500.

Validity.

Against marrying into specified family. *Phillips v. Ferguson*, VII, 460.

Against remarriage of a daughter. *Crawford v. Thompson*, IV, 57.

Against remarriage of husband. *Bostwick v. Blades*, VII, 200.

Against remarriage of wife. *Stillwell v. Knapper*, I, 211.

In general restraint of marriage. *Smythe v. Smythe*, VIII, 553.

Of being left a widow, or, for any cause, ceasing to be the wife of her husband. *Thayer v. Speer*, IV, 451.

That married woman become lawfully separated from her husband. *Born v. Horstman*, VII, 200.

CONDITIONAL LIMITATIONS.

On condition in restraint of marriage, void. *Smythe v. Smythe*, VIII, 553.

On death of devisee in fee, means death in life time of testator. *Vanderzee v. Slingerland*, V, 61.

— without issue, see **CONSTRUCTION, DEATH WITHOUT ISSUE**.

— under bequest of use of sum for life, principal to go to children. *Bliven v. Seymour*, I, 447.

Intestacy of devisee in fee, on condition subsequent repugnant to estate devised. *Moore v. Sanders*, II, 245.

Remarriage of husband, devisee. *Bostwick v. Blades*, III, 364.

Remoteness of contingency on which one remainder limited, validity of alternative remainder. *Walker v. Lewis*, VIII, 413.

CONFLICT OF JURISDICTION.

Estate in course of administration. *Byers v. McAuley*, VIII, 444.

CONFLICT OF LAWS.

Adoption and legitimation. *Blythe v. Ayres*, VIII, 493.

Bequest as execution of power of appointment. *Cotting v. DeSartiges*, VIII, 258.

Descent of land and its disposition for payment of debts. *Williams v. Nichols*, V, 48.

Execution of will of realty. *Nelson v. Potter*, VII, 347.

Formal attestation of will governed by statute in force at time of execution. *Appeal of Lane*, VII, 90.

CONFLICT OF LAWS—(Continued).

Gift over to "heirs-at-law of" first legatee, law of domicile of testator at his death. *Lincoln v. Perry*, VII, 289.

Interests of devisees of real estate. *McCartney v. Osborn*, V, 594.

Legitimation of children by subsequent marriage of parents. *Adams v. Adams*, VIII, 1.

Money deposited in bank and note secured by mortgage, bank book and note at foreign domicile. *Speed v. Kelly*, II, 553.

Validity of will as to form. *Succession of Gaines*, VIII, 479.

CONSIDERATION.

Failure of, does not defeat devise. *Martin v. Martin*, II, 220.

CONSTITUTIONAL LAW.

Subject of act, stating in title. *Ca'loway v. Cooley*, VIII, 360.

CONSTRUCTION.

Ambiguity in description, declarations of testator admissible to explain. *Burnet v. Burnet*, I, 539.

Another will, provisions of, when to be deemed part. *Gerrish v. Gerrish*, I, 59.

Charitable trusts, favorably construed. *Mills v. Newberry*, V, 318.

— of a public nature. *Hunt v. Fowler*, VI, 444.

— by same rules as private trusts. *Holland v. Alcock*, VII, 188.

Codicil and will as if executed and published at the same time. *Caulfield v. Sullivan*, II, 43.

Codicil disposing of same subject matter as will. *Sturgis v. Work*, VII, 23.

Conditions defeating estate, when not favored. *Calkins v. Smith*, I, 154.

Contingency. *Cowley v. Knapp*, I, 390.

Death of legatee before he "shall have received" his share. *Johnes v. Beirs*, VII, 435.

Direction as to proceeds requiring sale equivalent to command to sell. *Roy v. Monroe*, VII, 413.

Dower, when provision is in lieu of. *Stewart v. Stewart*, I, 163.

Family, devise in trust for use of. *Stuart v. Stuart*, II, 527.

— marrying into. *Phillips v. Ferguson*, VII, 460.

General rules, when set aside by extrinsic evidence. *Ebert v. Ebert*, I, 559.

Heirs of living person as devisees of future estate. *Stuart v. Walker*, II, 527.

"Heirs" of a legatee, by what law determined. *Lincoln v. Perry*, VIII, 289.

Inseparability of trusts for daughter and her heirs. *Slade v. Patten*, I, 346.

Instrument conveying present title reserving life estate. *Beebe v. McKenzie*, 585.

Issue as word of purchase. *Peirce v. Hubbard*, VIII, 383.

Lapse, provision for, only by clear intimation. *Cowley v. Knapp*, I, 390.

Power as directed to sell. *Fahnestock v. Fahnestock*, VIII, 843.

Precatory words to be given their natural and ordinary sense unless clearly used in a peremptory sense. *Mills v. Newberry*, V, 318.

CONSTRUCTION—(Continued).

- Prior absolute gift, when does not defeat executory devise. *Read v. Watkins*, III, 488.
- Purpose assigned cannot control if language not doubtful. *Terry v. Smith*, V, 277.
- Rejecting erroneous part of description. *Merrick v. Merrick*, II, 161.
- Repugnant residuary clauses. *Covert v. Sebern*, VI, 559.
- Resistance of probate, provision against. *Donegan v. Wade*, III, 206.
- Rule that void devise passes to heirs at law not altered by statute passing all real estate of testator at time of death. *Rizer v. Perry*, III, 303.
- Technical words not necessary to create a trust. *Colton v. Colton*, VI, 11.
- Technical terms presumed used in legal sense. *Porter's Appeal*, II, 234.
- Technical meaning yields to equities and intent. *Wright's Appeal*, I, 125.
- Trust with alternative ulterior provision, what is not. *Tilden v. Green*, VIII, 34.
- Vesting, earlier of two possible periods favored. *Larmour v. Rich*, VII, 156.
- Wish for specified disposition in certain contingency as a direct bequest. *Bliven v. Seymour*, II, 447.

Intention.

- Circumstances in view of which will was made as tending to show. *Eberts v. Eberts*, I, 559.
- Contrary to writing cannot be shown by evidence. *Griscom v. Everts*, I, 130.
- Controls deed or will. *Beebe v. McKenzie*, VII, 538.
- Controls formal rules. *Robison v. Female Orphan Asylum Society*, VI, 51.
- rule in Shelley's case. *Mellet v. Ford*, V, 384.
- that executor shall sell personal property of a perishable nature given for life with remainder over. *Britt v. Smith*, II, 87.
- that gifts of fixed sums payable out of rents and profits authorize taking part of the corpus to make up a deficiency. *Delaney v. Van Aulen*, II, 387.
- Controls technical meaning of words. *Wright's Appeal*, I, 125.
- Declaration of, distinguished from extrinsic circumstances. *Griscom v. Everts*, I, 130.
- Declaration to show that person or thing different from one mentioned was meant. *Burnet v. Burnet*, I, 539.
- Indicated by language. *Robison v. Female Asylum Society*, VI, 51.
- Latent ambiguity. *Griscom v. Everts*, I, 130.
- Legacies with amounts left blank. *Denton v. Clark*, III, 356.
- Not shown by parol. *Foster v. Smith*, VIII, 268.
- Intent to devise all the property, residuary devise as indication. *Byrnes v. Baer*, II, 383.

CONSTRUCTION—(Continued).

To dispose of property previously given must appear from language.

Sherman v. Lewis, VII, 233.

Interpretation in light of surrounding circumstances, to show intent to devise all real estate, so as to pass after acquired property. *Byrnes v. Baer*, II, 383.

—must be found in words of will, and not inferred from extrinsic facts.

Byrnes v. Baer, II, 383.

Time from which will speaks.

Will speaks from death of testator. *Martin v. Martin*, II, 220.

— Unless by fair construction language indicates contrary intention. *Hammond v. Hammond*, II, 119.

— Not when language rebuts presumption. *Martin v. Martin*, II, 220.

Will and codicil speak from date of latter. *Hatcher v. Hatcher*, V, 439.

Bequest of shares of certain company "now standing in my name on its books." *Fidelity Trust Company's Appeal*, IV, 556.

Extrinsic Evidence.

Of the circumstances, situation and surroundings admissible to place the court in the position of the testator. *Griscom v. Evens*, I, 130.

— for what purpose admissible. *Burnet v. Burnet*, I, 539.

— as distinguished from declarations of intention. *Griscom v. Evens*, I, 130.

Of facts and circumstances respecting persons or property to which the will relates. *Hammond v. Hammond*, II, 119.

Of situation of parties. *Little v. Giles*, VII, 312.

To show intent to devise all of property. *Byrnes v. Baer*, II, 383.

— to omit children from will. *Thomas v. Black*, VIII, 335.

Property and Estate.

Bequest implied, of property, by gift of balance of rents and proceeds of sale. *Masterson v. Townshend*, VII, 311.

— when whole will produces conviction as to interest not expressly bequeathed. *Metcalf v. First Parish in Framingham*, I, 11.

General devise, words, of yield to a clear enumeration of particulars. *Griscom v. Evens*, I, 130.

General words such as "goods and chattels" do not include notes and money except in residuary bequests. *Peaslee v. Fletcher's Estate*, 217.

Entire, of testator, unless contrary intent clearly appears. *Little v. Giles*, VII, 312.

— known or unknown, immediate or remote, by general residuary devise. *Floyd v. Carow*, II, 499.

Not held contingent without decided terms or necessity to carry out provisions. *Weatherhead v. Stoddart*, V, 284.

"Property." *Robinson v. Randolph*, V, 447.

Qualification of absolute gift in same clause. *Bullard v. Chandler*, VII, 191.

Resort to introductory clause. *Robinson v. Randolph*, V, 447.

CONSTRUCTION—(Continued).

Per stirpes by devise to "legal heirs of" *In re Swinburne*, VII, 355.

Children.

As word of limitation. *Mosby v. Paul's Admr*, VIII, 177.

— children and grandchildren. *Halstead v. Hall*, III, 462.

— in devise to son "for his support and estate, to be and remain bequeathed to his children." *Oyster v. Oyster*, III, 372.

Include issue of a deceased child whenever the context permits. *Matter of Patton*, VI, 6.

Dying Without Issue.

In absolute devise with limitation over. *Vanderzee v. Slingerland*, V, 61.

Matter of New York, Lackawanna & Western Ry, Co, V, 312. *Matter of Tienken*, VIII, 157.

Indefinite failure of issue. *Hackney v. Tracy*, VII, 343.

In devise to two with limitation over. *Pinkham v. Blair*, I, 114.

In gift of remainder. *Sommers v. Smith*, VII, 118. *McCormick v. McElligott*, VII, 565.

In absolute devise, refers to life time of testator. *Mickley's Appeal*, I, 615. *Vanderzee v. Slingerland*, V, 61.

— only when context affords no indication. *Matter of New York, Lackawanna & Western Ry. Co.*, V, 512.

— varied by slight circumstances. *Vanderzee v. Slingerland*, V, 61.

"Without legal heirs." *Underwood v. Robin*, VII, 52.

"Die, leaving no heir of their body." *In re Swinburne*, VII, 355.

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"And" and "or." *Cody v. Bunn*, VII, 526.

"Devised as bequeathed." *Bliven v. Seymour*, II, 447.

"Of" construed to be a "To." *In re Swinburne*, VII, 355.

CONTINGENT INTERESTS.

Sale of. *Hovey v. Nellis*, VIII, 502.

CONTINGENT WILL.

In will of one about to travel with her husband. "In case anything should happen to us I should wish." *Cowley v. Knapp*, I, 390.

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By executors, liability of estate. *Columbus Watch Co. v. Hodenpyl*, VIII, 316.

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— liability of executor. *Matteson v. Farnham*, VII, 214.

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Creditor renewing note. *Columbus Watch Co. v. Hodenpyl*, VIII, 316.

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Administrator borrowing money, personally liable. *Merchants Nat. Bank v. Weeks*, II, 45.

Agreement by heir not to contest will. *Bellows v. Soules*, IV, 529.

— promise by executor in consideration of. *Bellows v. Soules*, IV, 529.

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Providing for payment to heirs, not assets. *Stevens v. Flannagan*, VIII, 260.

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Request in will that bookkeeper take charge of books at fixed salary. *Harker v. Smith*, IV, 525.

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As to intended discrimination made long before execution of will. *Dye v. Young*, II, 315.

Made after execution of the will to show undue influence. *Milton v. Hunter*, I, 521.

Not competent to prove undue influence. *Middleditch v. Williams*, VII, 447.

Of desire to see his son and that he did not know but that he had been deceived. *Potter v. Baldwin*, III, 292.

That he executed the will in presence of the attesting witnesses. *Beudles v. Alexander*, II, 173.

That he had written a will and as to its contents. *Mercer v. Muckin*, I, 399.

That he understood that will was revoked. *Hoitt v. Hoitt*, V, 529.

That legacies were intended as payment for services rendered. *Reynolds v. Robinson*, I, 583.

To show estrangement and illwill towards devisee. *Mooney v. Olsen*, I, 65.

To show intent as to revival of earlier will. *Pickens v. Davis*, III, 225.

— to revoke. *Gay v. Gay*, III, 540.

— as to money passing to legatee. *Van Houten v. Post*, I, 422.

— to make changes in will affected by codicil. *Hammond v. Dike*, 146.

To show knowledge of contents of will. *Robinson v. Brewster*, VIII, 235.

DECLARATIONS OF TESTATOR—(Continued).

- To show mental condition. *Mooney v. Olsen*, I, 65.
- To show payment of money to distributee. *Van Houten v. Post*, I, 423.
- To show state of feelings towards those benefited. *Canada's Appeal*, I, 1.
- To show that a person or thing different from the one mentioned in the will was meant. *Burnet v. Burnet*, I, 539.
- To show which of two or more persons or things answering description was meant. *Burnet v. Burnet*, I, 539.

Weight.

- As to how he intended to dispose of his property, disconnected from act of making will. *Will of Storer*, II, 327.
- That he had written a will, and as to its contents. *Mercer v. Mackin*, I, 399.

DEED.

See, also, **ASSIGNMENT.**

- As revocation of devise. *Emery v. The Union Society*, VI, 330.
- As execution of power though will not recited. *South v. South*, IV, 69.
- By foreign executor. *Calloway v. Cooley*, VIII, 360.
- By life tenant with power to convey in fee. *Baird v. Boucher*, III, 467.
- Conveying present interest on trusts testamentary in character. *Bromley v. Mitchell*, VIII, 229.
- Reserving right to use and possession for life. *Beebe v. McKenzie*, VII, 538.
- Inoperative for want of delivery, probate. *Estate of Skerrett*, V, 37.
- Posthumous disposition of property. *Hazleton v. Reed*, VII, 268.
- Retained in custody of grantor until death. *Clive v. Jones*, V, 341.
- Set aside as obtained by undue influence, not revocation of will. *Graham v. Burch*, VIII, 11.
- Transferring personalty in trust to pay income during grantor's life, and after her death to distribute. *Forney v. Remly*, VII, 476.
- To be delivered after death, as codicil. *Kelly v. Richardson*, VIII, 397.
- To take effect at grantor's death. *Bunch v. Nicks*, VI, 576.
- Will in form of. *Armstrong v. Armstrong*, I, 206.

DEMONSTRATIVE LEGACIES.

See, also, **LEGACIES, SPECIFIC LEGACIES.**

- Legacies held demonstrative, not specific. *Bradford v. Brinley*, VI, 279.
- Fund inadequate, payable out of principal. *Additon v. Smith*, VII, 274.
- Legacy considered as disposition of homestead. *Roquet v. Eldridge*, VII, 91.
- Take precedence out of a fund. *Additon v. Smith*, VII, 274.

DESCENT AND DISTRIBUTION.

- Adopted child of deceased son. *Estate of Sunderland*, III, 522.
- Claim for past maintenance of infant distributee. *Hyland v. Baxter*, IV, 478.
- Cousins and second cousins. *Byers v. McAuley*, VIII, 444.
- Husband inheriting personalty from wife. *Robins v. McClure*, IV, 466.
- without administration. *In Matter of Lee*, VIII, 284.

DESCENT AND DISTRIBUTION—(Continued).

Illegitimate children, subsequent marriage of parents. *Miller v. Miller*, III, 294; *Adams v. Adams*, VIII, 1.

Murder of ancestor by distributee. *Riggs v. Pulmer*, VII, 329.

Posthumous child. *Pearson v. Carlton*, III, 338.

Property in state, what is. *Speed v. Kelly*, II, 553.

DEPOSITION.

Exhibition of will to commissioners in foreign country. *Russell v. Hartt*, II, 297.

DEVISE.

See also, BEQUEST, CHARGE ON REALTY, CHARITABLE BEQUESTS, CONDITIONS, CONDITIONAL LIMITATIONS, CONSTRUCTION, EXECUTORY DEVISE, JOINT TENANTS AND TENANTS IN COMMON, LEGACY, LIFE ESTATE, LIMITATION OVER, REMAINDER.

Estate not be enlarged by striking out words. *Erbach v. Collins*, IV, 17.

Estate passing by use of word property. *Robinson v. Randolph*, V, 447.

"For the consideration" that devisee do certain things. *Armstrong v. Armstrong*, I, 206.

Implied from interest not expressly bequeathed. *Metcalf v. First Parish*, I, 11.

Residuary devise to executors with power of sale in trust for payment of legacies in violation of statute. *Chamberlin v. Taylor*, V, 508.

Resort to introductory clause when intent not clear. *Robinson v. Randolph*, V, 447.

Revocation of. See REVOCATION.

Separate equitable estate. *Robinson v. Randolph*, V, 447.

To executor on trust too indefinite. *Fairfield v. Lawson*, IV, 36.

DEVISEES AND LEGATEES.

Unincorporated religious societies. *Rhodes v. Rhodes*, VII, 468.

Who are included.

Daughter of deceased sister not in devise over to sisters. *Gorham v. Betts*, VI, 143.

Family as designation of beneficiaries. *Stuart v. Stuart*, II, 527.

Issue of children dying before making of will, in remainder to children and issue of those dying before wife. *Outcalt v. Outcalt*, V, 273.

— in devise of remainder to children of life tenant and their issue except one son of a deceased child. *Bronson v. Phelps*, V, 231.

Husband not among "heirs and next of kin" of wife. *Irwin's Appeal*, IV, 176.

Illegitimate child, parents subsequently contracted void marriage, under bequest to present wife for herself and all the children of its father. *Adams v. Adams*, VIII, 1.

Legatee named in codicil not included among legatees named in this will, or "before named." *Huston v. Read*, I, 501.

Near relations of testator and his wife. *Handley v. Wrights*, III, 530.

Next of kin of testator, in limitation over. *Pinkham v. Blair*, I, 114.

DEVISEES AND LEGATEES—(Continued).

Next of kin of deceased legatee, brother, to exclusion of issue of deceased brother. *Swasey v. Jacques*, V, 412.

Nieces, wives of nephews not included. *Huston v. Read*, I, 501.

Personal representatives who would be entitled to personal estate of first taker according to law. *Davies v. Davies*, VI, 361.

Remainder to one, to descend to his female children and grandchildren. *Hulstead v. Hall*, III, 462.

Surviving children of another. *Ebert v. Ebert*, I, 559.

Survivors or their legal representatives, in provision for substitution on death of legatee before testator. *Rivenett v. Rivenett*, IV, 284.

Children.

Include issue of deceased child when context permits. *Matter of Paton*, VI, 6.

Children of another, grandchildren not included. *Palmer v. Horn*, II, 92.

Devise to a daughter and her children, joint tenancy between the daughter and her children living at the testator's death. *Biggs v. McCarty*, III, 278.

Direction for division of the property among children when youngest becomes of age, after bequest to wife and the five younger children. *Bland v. Bland*, II, 475.

Gift to the children of A, and B, persons who could not have offspring jointly is gift to B., and to the children of A. *Burnet v. Burnet*, I, 539.

Posthumous children.

Bequest "after death of testator's daughter to her children and grandchildren" etc., descendants then unborn, living at daughter's death. *Cheever v. Circuit Judge*, II, 60.

Bequest to children of another. *Culp v. Lee*, VIII, 128.

Direction for division among grandchildren of share of one dying before distribution. *In Matter of Smith*, VIII, 199.

Grandchild born two days after testator's death, "living grandchild." *Randolph v. Randolph*, V, 406.

Heirs.

"Aforesaid heirs," in bequest after legacy to children and grandchildren. *Huston v. Cook*, III, 41.

As children. *Bland v. Bland*, II, 475.

Gift over to "heirs at law" of first legatee, by what law governed. *Lincoln v. Perry*, VII, 283.

Of husband, widow not included. *Doge's Appeal*, IV, 357.

Of testator, in devise over. *Dove v. Torr*, I, 433.

— in direction for distribution. *Alexander v. Wallace*, II, 291.

"R, the legal heirs B, and of T" and five others, "of T," as "to T." *In re Swinburne*, VII, 355.

Reversion to right consanguinary heirs on death of daughter without issue. *Pierce v. Hubbard*, VIII, 333.

"Right heirs" of children. *Ballentine v. Wood*, V, 244.

Misnomer.

Description applicable to different claimants, bill of interpleader by executor. *Morse v. Stearns*, II, 51.

DEWISEES AND LEGATEES—(Continued).

- Indigent Widows' and Single Women's Society of Philadelphia entitled to bequest to the Trustees of the Widows' Asylum of Philadelphia. *Doughten v. Vandever*, VI, 392.
- Joseph White Sprague presumed to be intended by legacy "to my nephew J. S. Sprague" though testatrix has another nephew named Joseph Sprague Stearns. *Morse v. Stearns*, II, 51.
- Orphan Society of Philadelphia entitled to bequest to "trustees of the orphan asylum of Philadelphia." *Doughton v. Vandever*, VI, 392.
- Pennsylvania Seamen's Friend Society entitled to bequest to the trustees of the Marine Society of Philadelphia. *Doughton v. Vandever*, VI, 392.

Evidence.

- Board of foreign and board of home missions, to show who entitled. *Gilmer v. Stone*, V, 68.
- Conduct and declarations of testator to show relation to and state of feeling towards claimants. *Morse v. Stearns*, II, 51.
- First Presbyterian church of village of Omro shown to be intended for First Presbyterian Society of town of Omro. *Webster v. Morris*, V, 158.
- Misnomer of corporation. *The University v. Tucker*, VI, 597.
- Mistake of scrivener as to initials. *Covert v. Sebern*, VI, 559.
- Names by which testator knew societies, interest shown and contributions made by him, admissible. *Hinckley v. Thatcher*, IV, 483.
- Omro and Algoma Union Cemetery Association, there being no society of that name but an Omro Cemetery Association and a Union Cemetery Association. *Webster v. Morris*, V, 158.
- That testator told scrivener he had in mind a particular association. *Fairfield v. Lawson*, IV, 36.
- To show that bequest to "S. G. son of Capt. J. F. S. intended for S. G., son of Capt. J. F. H.; J. F. S., having at the time no son named S. G., and never being known as Captain." *Hawkins v. Garland*, III, 550.
- To show that illegitimate nephew was intended, testator leaving legitimate nephew of same name. *Appel v. Byers*, III, 1.

Rights.

- See, also, INTEREST ON LEGACIES, LIFE ESTATES, REMAINDERS.
- Agent of, entitled to petition for administration. *Russell v. Hartt*, II.
- Allowance to infant out of interest, legacy payable at majority with limitation over in case of previous death. *Flinn v. Flinn*, III, 560.
- Bequest to a society one half to be applied in aid of freedmen's schools other than specified school established and maintained by it and another legacy to that school. *Dascomb v. Marston*, VI, 248.
- Competency as witness on contested probate. *Schofield v. Walker*, V, 211; *Hays v. Ernst*, VIII, 512.
- Corporation legatee, stockholder competent subscribing witness. *Marston et al. Petitioners*, VI, 229.
- Devise of share of entire lot of which he owns a part. *Brown v. Brown*, VII, 132.

DEWISEES AND LEGATEES—(Continued).

Executrix legatee entitled to interest though having cash in hand sufficient to pay. *Handy v. Collins*, III, 570.

Foreign judgment determining. *McCartney v. Osborn*, V, 594.

Guardian accepting less sum than due. *Culp v. Lee*, VIII, 128.

Increase in value, shares not allotted. *Monson v. New York Sec. & Tr. Co.*, VIII, 512.

Interest received on fund directed to remain uninvested till legatee's majority and not to vest until then. *Whitworth v. Ewing*, V, 469.

Murder of testator. *Riggs v. Pulner*, VII, 329.

No interest in mortgage held by executor. *Lockman v. Rilly*, IV, 194.

Of remainderman, see **REMAINDERS**.

Permitting money to remain with testator's firm. *Columbus Watch Co. v. Hodenpyl*, VIII, 316.

Proceeds of land sold by testator. *Emery v. The Union Society*, VI, 330.

Reformation of description in will. *Sturgis v. Work*, VII, 23.

Release of interest in estate, consideration paid by testator. *Allen v. Allen*, I, 479.

Right to possession of personalty under bequest for life, see **LIFE ESTATE**.

Subrogation on abatement of legacies. *Hope v. Wilkinson*, IV, 213.

Title of, is by purchase. *Stamm v. Bostwick*, VII, 501.

Town, tax payer, not incompetent witness. *Marston et al., Petitioners*, VI, 229.

Transfer of interest from one to another. *Kelly v. Richardson*, VIII, 397.

— land given by instrument operating as codicil when not embraced. *Kelly v. Richardson*, VIII, 397.

Under bequests for life, see **LIFE ESTATE**.

Under direction that executors allot and set apart shares of a specified amount and value. *Monson v. New York Sec. & Trust Co.*, VIII, 512.

Under legacy charged on land, see **CHARGE ON LAND**.

Distribution.

To class not named, "heirs at law" of testator. *Kelly v. Vigas*, V, 315.

—Per Capita or per stirpes.

Bequest to certain children and grandchildren equally. *Kimbro v. Johnston*, V, 495.

Gift to one and the children of another. *Burnet v. Burnet*, I, 539; *McCartney v. Osburn*, V, 594; *Culp v. Lee*, VIII, 128.

Equally distributed among heirs, share and share alike. *Allen v. Allen*, I, 479.

One share to one daughter absolutely, one to three others, minors, and one to each of two other daughters for life. *Holman v. Price*, II, 216.

Liabilities.

Acceptance of devise, proof of. *Hunkypillar v. Harrison*, VIII, 605.

— limitation of actions on. *Etter v. Greenwalt*, III, 84.

Bequest of business-legatee assuming all its liabilities. *Kelly v. Richardson*, VIII, 397.

DEVISEES AND LEGATEES—(Continued).

Continuing business under clause so desiring giving the profits and directing that money invested remain for specified time without interest.

Bennett v. Rhodes, III, 143.

Election between will and interest in property specifically devised to another. *Iser v. Iser*, III, 118.

Estoppel by representations of husband. *Akin v. Kellogg*, VII, 570.

For debts and funeral expenses by bequest of "all my personal property." *Miller v. Cooch*, VI, 435.

For general debts, legacy charged with specific debts. *Kelly v. Richardson*, VIII, 397.

For legacy charged, see **CHARGE ON LAND**.

Personal, for annuity directed to be paid out of proceeds. *Hunkypillar v. Harrison*, VIII, 605.

DISTRIBUTION.

Conclusiveness of bona fide. *Ward v. Kitchen*, I, 355.

Decree for, not bar to have devise declared a trust. *Colton v. Colton*, VI, 11.

Without order of court after expiration of time to present claims without special leave. *Brown v. Forsche*, I, 607.

— liability for claims subsequently allowed. *Brown v. Forsche*, I, 607.

Estate of insolvent surety; deducting payment by trustees of insolvent principal. *Lowell v. Estate of French*, II, 507.

In state of ancillary jurisdiction. *Succession of Gaines*, VIII, 537.

Jurisdiction of federal court to award. *Byers v. McAuley*, VIII, 444.

Not a disposition of homestead by law. *Fore v. Fore's Estate*, VIII, 114.

Ordered semi-annually. *Rostel v. Morat*, VII, 627.

Trust unconnected with unpaid legacies not yet performed. *Thyng v. Moses*, VII, 262.

DIVORCE.

Bequest to wife, not revoked or annulled. *Card v. Alexander*, II, 397.

Plaintiff not resident of state time prescribed. *Adams v. Adams*, VIII, 1.

— subsequent marriage as legitimation of child. *Adams v. Adams*, VIII, 1.

DOMICILE.

Effect of foreign judgment determining. *Thomas v. Morisett*, VI, 525.

Presumption as to sufficiency of evidence on probate. *Corrigan v. Jones*, VII, 582.

DOWER.

Computation of share of widow, electing to take. *Ford v. Ford*, VIII, 589.

Testamentary provision in lieu of.

Abatement. *Howard v. Francis*, I, 321.

Annuity, apportionable and payable for part of year to annuitant's death. *Cushing's Will*, V, 295.

Gift of income of estate for life with such part of the principal as shall be necessary to give her "a good and comfortable support." *McKenzie v. Ashley*, VI, 303.

DOWER—(Continued).

Interest. *Howard v. Francis*, I, 821; *Matter of Hodgman*, VIII, 472.

Priority. *Howard v. Francis*, I, 821; *Security Company's Appeal*, IV, 552.

—What is.

Express words or necessary implication essential. *Konvalinka v. Schlegel*, V, 810.

If claim of, clearly inconsistent with will. *Stewart v. Stewart*, I, 168.

Inference from extent of provision or nature of estate given. *Konvalinka v. Schlegel*, V, 810.

Presumed to be in Ohio. *Corry v. Lamb*, VI, 567.

Residuary bequest charged with legacies. *Le Fevre v. Toole*, IV, 403.

Residuum of estate given to executors to sell and divide proceeds between wife and children equally. *Konvalinka v. Schlegel*, V, 810.

When clearly intended as substitute. *Stewart v. Stewart*, I, 168.

—Acceptance.

See, also, **ELECTION**.

Dower in property conveyed by husband. *Corry v. Lamb*, VI, 597.

Lapsed legacies. *Robins v. McClure*, IV, 466; *Matter of Hodgman*, VIII, 472.

Rights under mortgage on property. *Russell v. Minton*, V, 125.

DRUNKENNESS.

Effect of, on validity of will. *Key v. Holloway*, I, 360.

Proof of, on question of mental capacity. *Estate of Johnson*, II, 524.

DUPLICATE WILL.

Both parts need not be probated but may be required to be exhibited.

Crossman v. Crossman, IV, 121.

EDUCATION.

Bequest in aid of Freedman's schools. *Dascomb v. Marston*, VI, 248.

Bequest to town to establish school fund. *Piper v. Moulton*, II, 574.

EJECTMENT.

Defendant claiming under testamentary instrument of person still alive.

Smith v. Tuit, VII, 473.

ELECTION.

See, also, **ESTOPPEL**.

Failure to make within the time limited by statute. *Akin v. Kellogg*, VII, 570.

To avoid decree, when made in time. *Potter v. Ogden*, VIII, 864.

To claim in opposition to will, notice of, given on return of property received under. *Watson v. Watson*, I, 571.

To take dower, share how computed. *Ford v. Ford*, VIII, 589.

To take testamentary provision not bar to rights under mortgage. *Russell v. Minton*, V, 125.

Necessity.

Between bequest and proprietary rights in property attempted to be disposed of by will. *Noe v. Splivalo*, I, 499; *Watson v. Watson*, I, 571.

ELECTION—(Continued).

Between claim against decedent and will making creditor universal legatees on condition of executing disposition therein contained. *Cautfield v. Sullivan*, II, 43.

Between claim for money given to husband to invest and provisions in lieu of dower "and any other claim she may have against estate." *Rusling v. Rusling's Adm'r*, V, 251.

Between dower and testamentary provision. See **DOWER**.

Between will and interest of devisee in property specifically bequeathed to another. *Iser v. Iser*, III, 118.

By devisee of share in entire lot of which he owned a part. *Brown v. Brown*, VII, 132.

Direction that widow "retain the home place" of which she owned a part, and that at her death it go to son. *Penn v. Guggenheimer*, III, 487.

Not necessary unless intent to dispose of property previously given to beneficiary clearly appears. *Sherman v. Lewis*, VII, 233.

How Made.

Actual possession of land, when not sufficient. *Fisher v. Williams*, VII, 96.

By court for insane widow. *State v. Ueland*, III, 118. *Van Steenwyck v. Washburn*, IV, 337.

By heirs after death of widow in ignorance of her rights. *Fisher v. Williams*, VII, 96.

By widow in person, not by legal representatives. *Milliken v. Welliver*, II, 417.

Entering into and retaining possession of realty, and selling homestead. *Chapman v. Chick*, VI, 310.

Matter of record or under circumstances to create estoppel. *Milliken v. Welliver*, II, 417.

Possession and control of property, payment of debts and holding balance for five months. *Milliken v. Welliver*, II, 417.

Residence on place for thirty years, payment of taxes and exercising acts of ownership of entire property. *Penn v. Guggenheimer*, III, 487.

EQUITABLE CONVERSION.

By devise in trust with power of sale and out of the proceeds or income to pay annuity, with residuary devise in three shares. *Powers v. Cassidy*, I, 368.

By direction as to proceeds requiring sale. *Roy v. Monroe*, VII, 413.

By direction to sell and divide proceeds. *Matter of Corrington*, VI, 120.

By power of sale. *Fahnestock v. Fahnestock*, VIII, 348.

— accountability for rents and profits. *Lent v. Howard*, III, 109.

— imperative though discretionary as to time. *Lent v. Howard*, III, 109.

— discretionary, with option to devisees to take part of land at valuation. *Paterson's Appeal*, I, 187.

— for purpose of distribution, bequest to executors. *Greenland v. Waddell*, VII, 590.

EQUITABLE CONVERSION—(Continued).

- not unless imperative or sale necessary. *Parker v. Linden*, VI, 411.
- option to heirs for division among themselves. *Jones v. Caldwell*, II, 154.
- sale intended though power not in terms imperative. *Powder v. Cassidy*, I, 868.
- By positive direction to sell after death of widow. *Jones v. Caldwell*, II, 154.
- Devise of proceeds of lands directed to be sold a devise of the land within statute relating to after acquired property. *Byrnes v. Baer* II, 283.
- Effect of, as against judgment against heir. *Emberg v. Carter*, VII, 481.
- Fiction not favored, same rights devolving on same persons. *Tienken v. Tienken*, VIII, 157.
- Gift to each of two of "interest of one-sixth part of estate for life, and on their respective deaths said interest as well as principal to another." *Terry v. Smith*, V, 277.
- Land purchased by executor under foreclosure by him. *Lockman v. Reilly*, IV, 194.
- Purpose of, failing. *Roy v. Monroe*, VII, 413.
- Share of estate lapsed by breach of condition not converted. *Phillips v. Ferguson*, VII, 460.

EQUITABLE MORTGAGE.

- Not lien against *bona fide* purchaser. *Watkins v. Reynolds*, VII, 442.
- By agreement of remainderman as to lien created by life tenant. *Watkins v. Reynolds*, VII, 442.

EQUITY JURISDICTION.

- Accounting by executor and construction of will. *Wager v. Wager*, III, 27.
- Action to charge executors as trustees, for fraud and undue influence in procuring will. *Post v. Mason*, III, 43.
- Actions to enforce payment of legacies charged on land. *Williams v. Nichols*, V, 43.
- Of federal courts over settlement of estates. *Hayes v. Pratt*, VIII, 349.
- Of probate courts in settlement of accounts. *Matter of Corrington*, VI, 120.
- Not to set aside will for fraud or undue influence. *Post v. Mason*, III, 43.
- Relief from failure to elect. *Akin v. Kellogg*, VII, 570.
- To enforce covenant to stand seized to use, in form of will. *Bolman v. Overall*, VI, 59.
- To remove trustee for neglect or breach of duty. *Williams v. Nichols*, V, 43.
- Settlement of estates in New Jersey. *Hayes v. Pratt*, VIII, 349.

ESTATE IN FEE.

- See, also, CONDITIONS, CONDITIONAL LIMITATIONS, LIFE ESTATES, REMAINDER.
- Bequest to wife and in case of her death to her heirs and assigns forever. *Brown v. Merriil*, II, 148.

ESTATE IN FEE—(Continued).

- Bequest to one and her assigns to use and dispose of. *Forster v. Smith*, VIII, 248.
- Bequest without words of limitation. *Mitchell v. Morse*, VII, 508; *Halliday v. Stickler*, VII, 212.
- Devise of all property of every description after paying just debts. *Piatt v. Sinton*, II, 380.
- By a devise to a trustee without giving him power of control or disposition. *Allen v. Craft*, V, 365.
- Gift of the perpetual income of real estate. *Sampson v. Randall*, II, 1.
- Intention to pass by bequest to wife, shown by provision that if children should be born they shall share with her as residuary legatee. *Brown v. Merrill*, II, 148.
- Imposition of charge on devise operates to enlarge estate only when terms of devise are indefinite. *Johnson v. Johnson*, II, 281.
- Not by bequests of profits and benefits of land with direction for sale at specified time and distribution of proceeds among same persons. *Collier v. Grimesey*, II, 437.
- Not cut down by devise of remainder. *Mitchell v. Morse*, IV, 508.
- by gift of what remains at decease. *Halliday v. Stickler*, *Forster v. Smith*, VIII, 268.
- by provision that devisee should not alienate after death of husband. *Allen v. Craft*, V, 365.
- Unqualified power of disposal annexed to a devise not stating nature of estate, though there be a limitation, over. *Stuart v. Walker*, II, 79.
- When youngest child attains majority, by devise of rents and profits till that time, fee then to vest in devisee and his heirs and may by them or him be disposed of. *Shimer v. Mann*, IV, 310.

Rule in Shelley's Case.

- Devise to one and on her death to another, to descend to his female children and grandchildren and to their heirs forever. *Halstead v. Hall*, III, 462.
- Devise to one and in case of her death to her children. *Jones v. Webb*, VI, 422.
- Devise to one "and so to his heirs and assigns forever." *Keniston v. Adams*, VI, 223.
- Devise to one "during her natural life and after her death to the begotten heirs or heiresses of her body." *Leathers v. Gray*, VI, 72.

Absolute.

- Alternate limitations over in case of marriage with and without birth of issue, devisee dying unmarried. *Snyder v. Baker*, VI, 552.
- Bequest "to use and dispose of as she may think proper during life, provided she maintains and supports her mother during her life." *Canedy v. Jones*, III, 32.
- Condition for care and burial of one dying before testator. *Hammond v. Hammond*, II, 119.
- To one and her children in trust. *Mosby v. Paul's Admr*, VIII, 177.

ESTATE IN FEE—(Continued).

- To two with condition not to sell until ten years after one became of age, except to one another, and not to mortgage. *Anderson v. Cary*, II, 137.
- "For the consideration" that devisee do certain things. *Armstrong v. Armstrong*, I, 206.
- Gifts of income of allquot shares of estate for life, remainders to another, trust created by residuary clause. *Terry v. Smith*, V, 277.
- In consideration of care of testator during rest of his life. *Martin v. Martin*, II, 220.
- Limitation over, in case of death without issue. *Mickley's Appeal*, I, 615.
- Limitation over on death of devisee in fee without leaving a will. *Moore v. Saunders*, II, 245.
- Remainder to daughter and in case of her death without child or children to others. *McCormick v. McElligott*, VII, 565.
- Request to protect interests of children in event of remarriage. *Sake v. Thornberry*, VI, 149.
- Shares accruing by survivorship. *Gorham v. Betts*, VI, 148.

Conditional.

- To have and to hold during widowhood, determinable by remarriage only. *Frey v. Thompson's Admr*, II, 238.
- Remainder to children life tenant who attain the age of twenty-five years and issue of those who die under that age. *Coggin's Appeal*, VI, 338.
- Unqualified power of disposal, with limitation over of the estate or what may remain, at marriage of first taker. *Little v. Giles*, V, 312.
- In lieu of dower, and if she shall refuse to accept the same in lieu of dower to have only her right of dower in my estate;" not conditioned on her remaining his wife. *Curd v. Alexander*, II, 397.
- Devise if within specified time devisee becomes reconciled to certain persons; devise over if not so reconciled. *Page v. Frazers Adm'r*, I, 588.
- Under devise in fee, with limitation over on death without leaving legitimate heir of body. *Piatt v. Sinton*, II, 380.
- A devise to one for life with remainder to his surviving heirs in fee, leaves in the testator a contingent reversion in fee. *Floyd v. Carow*, II, 499.
- Devise with limitation over to the sisters of the devisee on death without issue, defeasible only in life time of sisters. *Gorham v. Betts*, VI, 143.

ESTATE TAIL.

- Estate in fee in Indiana. *Allen v. Craft*, V, 865.

ESTOPPEL.

- Acceptance of benefits under will estoppel to assert title to other property against it. *Noe v. Splitalo*, I, 571. *Watson v. Watson*, I, 571.
- return of property, and notice given, before other rights attach. *Watson v. Watson*, I, 571.
- property of testator in one country under will imposing condition as to property in another country, estoppel to claim as creditor of decedent. *Caulfield v. Sullivan*, II, 43.

ESTOPPEL—(Continued).

- of principal of legacy bar to claim interest. *Matter of Hodgman*, VIII, 473.
- Acceptance of share by distributee as estoppel to question validity of sale. *Palmerton v. Hloops*, VIII, 222.
- Guardian treating land as belonging to wards. *Bates v. Gillette*, VII, 423.
- Including improper charges in annual settlement. *McPike v. McPike*, VIII, 296.
- Listing property of deceased ward. *Sommers v. Boyd*, VIII, 107.
- Of attorney acting for vendor to set up title. *Little v. Giles*, VII, 312.
- Of devisee, by representations of her husband. *Akin v. Kellogg*, VII, 570.
- Possession and control of property, paying debts and holding balance for five months. *Miliken v. Welliver*, II, 417.
- To claim by previous claim for smaller amount. *Warren v. McGill*, VIII, 509.

EVIDENCE.

See also **ADMISSIONS, BURDEN OF PROOF, DECLARATIONS OF TESTATOR, PRESUMPTION.**

Admissibility.

- In ejectment against one claiming under contract testamentary in character. *Smith v. Tuit*, VII, 473.
- Execution of will not transaction between legatee and testator. *Hayes v. Ernst*, VIII, 381.
- Testator's knowledge of contents of will shown by circumstantial evidence. *Montague v. Allens' Exec'r*, 2, IV, 454.
- Not to show mistake not apparent on face of will. *Judy v. Gilbert*, II, 39.
- Statements made in testator's presence and his failure to deny them. *Milton v. Hunter*, I, 521.
- That another document was intended as part of will. *Baker's Appeal*, IV, 128.
- That defendant in ejectment entered under and performed testamentary contract. *Smith v. Tuit*, VII, 473.
- That testatrix always spoke of certain indebtedness as that of legatee. *Scott v. Neves*, VII, 510.
- That land actually owned but erroneously described was purchased with money borrowed under promise to devise it. *Judy v. Gilbert*, II, 39.
- That north east quarter of south east quarter was intended as devise of north east quarter. *Judy v. Gilbert*, II, 39.
- That will was intended to be operative only in a certain contingency. *Sewell v. Slingluff*, II, 597.
- That words reduced to writing and probated are not the words spoken by testator. *Bolles v. Harris*, I, 63.
- That words were inserted by scrivener without instructions. *Griscom v. Eeans*, I, 130.
- To explain motive of testator. *Phillips v. Ferguson*, VII, 460.

EVIDENCE—(Continued).

- To prove attestation, witness signing by mark. *Davis v. Semmes*, VII, 36.
- To show intentions of testator. *Forster v. Smith*, VIII, 268.
- To show that note was intended as evidence of advancement. *Fennell v. Henry*, III, 216.
- To show that testator did not own northeast quarter devised, but did own northwest quarter. *Decker v. Decker*, VI, 455.
- To show signing by another and authority to sign when done in the absence of the attesting witnesses. *Haynes v. Haynes*, I, 263.

Documentary Evidence.

- Charges in books, by parent against child. *Van Houten v. Post*, I, 422.
- Judgment of heirship of probate court of another state. *Morin v. Railroad*, IV, 462.
- Legacies with amounts left blank. *Denton v. Clark*, III, 356.
- Order appointing guardian for testator made a few hours after execution of will. *Rice v. Rice*, III, 128.
- Order of probate, effect in proceeding to contest. *Haynes v. Haynes*, I, 263.
- Record of action by testator against devisee. *Canada's Appeal*, I, 1.
- Statement signed by administrator, as acknowledgement of amount due. *Potter v. Ogden*, VIII, 364.
- Will revoked by execution of subsequent will. *Stute v. Crossly*, I, 413.

Secondary Evidence.

- Contents of holographic will destroyed after being copied. *Willbourn v. Shell*, II, 520.
- Contents of will proved to have been in existence at death of testator, unrevoked, and subsequently lost or destroyed. *Foster Appeal*, I, 435.

Sufficiency.

- As to Execution of will, see ATTESTATION, ATTESTATION CLAUSE.
- EXECUTION OF WILL. SUBSCRIBING WITNESSES.
- As to contents of will destroyed with connivance of some of the heirs. *Anderson v. Irwin*, II, 116.
- As to paternity of claimant. *Blythe v. Ayres*, VIII, 493.
- As to survivorship, testator and devisees perishing by some catastrophe. *Will of Ehle*, VI, 80.
- Existence of improper influence to show exercise. *Sundriland v. Hood*, V, 433.
- Joint receipt or joint release. *Mekin v. Aulbach*, II, 252.
- Judgment against foreign administrator. *Price v. Mace*, I, 73.
- Of appointment of guardian. *Potter v. Ogden*, VIII, 364.
- Order of probate as evidence of regularity of execution. *Behrens v. Behrens*, VII, 300.
- Payment to co-executor and taking his receipt as trustee. *Anderson v. Earle*, I, 472.
- Qualifying as executor, not proof of acceptance of trust created by the will. *Simpson v. Cook*, II, 27.
- That will was in existence unrevoked at death of testator and subsequently lost or destroyed. *Foster's Appeal*, I, 435.

EVIDENCE—(Continued).

- That transfer was intended as advancement. *McClanahan v. McClanahan*, VIII, 205.
- To establish execution of will, one subscribing witness dead. *Robinson v. Brewster*, VIII, 235.
- To justify probate of holographic will destroyed after being copied but copy defectively executed. *Wilbourn v. Shell*, II, 520.
- To show acceptance of bequest charged with legacy. *Hunkypillar v. Harrison*, VIII, 605.
- To show fraudulent destruction of will. *Estate of Kidder*, V, 154.
- To show knowledge of contents of will. *Worthington v. Klemm*, V, 415.
- Of single witness to prove contents of lost will. *Matter of Page*, V, 557.
- Weight of testimony given by medical experts. *Will of Blakely*, I, 284.

EXECUTION.

- Against executors continuing business and surviving partner. *Columbus Watch Co. v. Hodenpyl*, VIII, 316.
- Against property of testator, executor with power of sale cannot purchase. *Marshall v. Carson*, IV, 201.

EXECUTION OF WILL.

- See ATTESTATION, ATTESTATION CLAUSE, PROBATE, PUBLICATION, REPUBLICATION, SIGNATURE, SUBSCRIBING WITNESS.
- As to realty, governed by *lex rei sitæ*. *Nelson v. Potter*, VII, 347.
- Declaration of instrument as will. *Ludlow v. Ludlow*, III, 241.
- Holographic wills. *Succession of Armant*, VII, 361.
- In Oregon. *Luper v. Werts*, VII, 243.
- Knowledge of contents, how may be shown. *Worthington v. Klemm*, V, 415.
- by the subscribing witnesses or by other persons. *Key v. Holloway*, I, 360.
- inferred from the facts and circumstances attending the execution. *Key v. Holloway*, I, 360.
- Reading to or by testator not necessary. *Worthington v. Klemm*, V, 415.

Proof.

- Attestation clause as, see ATTESTATION CLAUSE.
- Declarations by testator. *Bradies v. Alexander*, II, 173.
- Effect to be given testimony of subscribing witnesses. *Webb v. Dye*, II, 558.
- Insufficiency of testimony of subscribing witnesses. *Luper v. Wer's*, VII, 243.
- Sufficiency of proof, one of the witnesses dead. *Robinson v. Brewster*, VIII, 235.
- Testimony of subscribing witnesses liable to be rebutted by other evidence. *Webb v. Dye*, II, 558.

EXECUTORS AND ADMINISTRATORS.

- See, also, ADMINISTRATION, ANCILLARY ADMINISTRATION, APPOINTMENT OF ADMINISTRATOR, APPOINTMENT OF EXECUTORS, FOREIGN EXECUTORS AND ADMINISTRATORS, JOINT EXECUTORS AND ADMINISTRATORS.

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- Competent witness to establish will, except as to transactions with, or state.ments made by testator. *Key v. Holloway*, I, 360.
- Declaration of executor who is a legatee. *Will of Ames*, I, 35.
- Directed to sell lands to pay debts cannot purchase under execution against testator. *Marshall v. Carson*, IV, 201.
- Distributees and beneficiaries no estate in mortgage held by executor. *Lockman v. Reilly*, IV, 194.
- Entitled to interest on legacy given though having cash in hands sufficient to pay it. *Handy v. Collins*, III, 570.
- Given use of property for life, trustee for other beneficiaries. *Cummings v. Corey*, V, 223.
- Executor and his wife competent attesting witnesses. *Stewart v. Harri-man*, I, 95.
- Land purchased by executor under mortgage foreclosed by him treated as personalty. *Lockman v. Reilly*, IV, 194.

Duties.

- Acceptance of executorship, assumption of trusts vested in executor. *Earle v. Earle*, III, 445.
- As to personalty, under general residuary bequest for life with remainder over. *Brannock v. Stocker*, II, 333.
- Bank stock not proper investment under direction to put legacy at interest. *Gilbert v. Welsch*, II, 302.
- Closed except for adjustment of account after paying funeral expenses, debts and legacies. *Calkin v. Smith*, I, 154.
- Degree of care and prudence to be exercised. *McFudgen v. Council*, I, 453; *Spaulding v. Wakefield's Estate*, II, 14; *McCabe v. Fowler*, II, 126.
- Direction to put legacy at interest must be strictly followed. *Gilbert v. Welsch*, II, 302.
- Caution as to approval of and acquiescence in acts of co-executors. *Earle v. Earle*, III, 445.
- Distribute without order of court after expiration of time to present claims without special leave. *Brown v. Forsche*, I, 607.
- Investment in securities in own name improper. *Gilbert v. Welsch*, II, 302.
- File semi-annual account. *Rostel v. Morat*, VII, 627.
- Not affected by probate in different states. *Hayes v. Pratt*, VIII, 349.
- Not guarantor of safety of securities in his charge. *McCabe v. Fowler*, II, 126.
- On apprehended depreciation in stocks in which specific legacy is invested. *Ward v. Kitchen*, I, 355.
- Permitting specific legacy to remain invested in stock designated. *Ward v. Kitchen*, I, 355.
- Reasonable time in which to exercise discretion as to conversion of assets. *Matter of Weston*, III, 89.
- Sale of personal property of a perishable nature given one for life with remainder over. *Britt v. Smith*, II, 78.

EXECUTORS AND ADMINISTRATORS—(Continued).

Trust to invest in such stocks or other productive property as executors deem advisable. *Carpenter v. Carpenter*, I, 448.

Trustees by instructions to invest a fund or to pay or set aside. *Randolph v. Randolph*, V, 406.

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Administer estate, duties imposed including those usually performed by trustees. *Webster v. Morris*, V, 158.

After paying funeral expenses, debts and legacies, nothing remaining but division of the residue. *Culkin v. Smith*, I, 154.

Appeal from order declaring administration void. *Matter of Mallory v. Burlington & Mo. R. R. Co.*, VIII, 436.

Appeal from refusal to probate will though all other parties in interest settle estate. *Cheever v. Circuit Judge*, II, 60.

Appearance in action in another state. *Braithwaite v. Harvey*, VIII, 571.

Collecting purchase price of chattels sold by executor *de son tort*. *Rockwell v. Young*, III, 471.

Determine time and amount of payments to legatee, conferred by will. *Pedrick v. Pedrick*, VIII, 425.

Directed to keep funds invested, may supplement assets with other funds in proper case. *Barry v. Lambert*, IV, 149.

Estate holding subsequent mortgage not necessary party on foreclosure. *Lockman v. Reilly*, IV, 194.

Executing mortgage, see MORTGAGE.

Executed by sole qualified executor. *Jennings v. Teague*, II, 8.

Of sale, see POWER OF SALE.

Payment of debt due himself. *Miller v. Irby*, I, 592.

Personalty transferred by executor *de son tort* to one not a creditor. *Rockwell v. Young*, III, 471.

Pledge assets, see PLEDGE.

Purchase land sold under mortgage held by him. *Lockman v. Reilly*, IV, 194.

Sale of interest by one legatee to another. *Kelly v. Richardson*, VIII, 397.

Under direction to allot and set apart shares of a specified amount and value. *Monson v. New York Security & Trust Co.*, VIII, 512.

Under direction to appropriate residue for suitable monument. *Bainbridge's Appeal*, II, 112.

Under authority to "repair" burying lot, erect sarcophagus, exchange a monument, erect headstone and replace coping. *Frazer's Accounting*, III, 258.

— will appointing separate executors for each of two states in which testator owned property. *Sherman v. Page*, II, 105.

Waive conversion and ratify exchange of property by life tenant. *Leonard v. Owen*, VIII, 567.

Liabilities.

Carrying out contract for delivery of property made by decedent. *Roach v. Ames*, III, 104.

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Charged also with trust duties. *White v. Ditson*, IV, 589.

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Debts due intestate collected in another state. *McPike v. McPike*, VIII, 296.

Demand not presented till it can be filed only as matter of favor. *Brown v. Forsche*, I, 607.

Delivering \$1,000 U. S. 5-20 bonds worth at the time \$1,200, in payment of legacies of \$1,000. *Spaulding v. Wakefield's Estate*, II, 14.

Deposit of fund for payment of expenses of administration, such fund being unnecessary. *Spaulding v. Wakefield's Estate*, II, 14.

Failing to show how much bonds brought, chargeable with highest market value. *Spaulding v. Wakefield's Estate*, II, 14.

Failing to show how much interest received on fund deposited. *Spaulding v. Wakefield's Estate*, II, 14.

Failure to invest in securities designated by law. *Ward v. Kitchen*, I, 855.

Failure to take legal steps to collect assets. *Gifford v. O'Connor*, VII, 225.
In respect to remainder in personalty given direct. *Posegate v. South*, VII, 544.

Judgment against, in favor of testator. *Charles v. Jacobs*, I, 77.

Mingling assets with private funds and using for individual benefit. *Troup v. Rice*, I, 18.

Money borrowed. *Merchants' Nat. Bank v. Weeks*, II, 145.

Paying claims in advance of order of court. *Rostel v. Morat*, VII, 627.

Paying mother wages of her deceased son, without administration. *Frazer's Accounting*, III, 258.

Personal property delivered to life tenant. *Posegate v. South*, VII, 544.

Promise to pay heir on agreement not to oppose probate. *Bellines v. Soules*, IV, 529.

Receiving rents accruing after death, trustee for heir not creditors. *Evans v. Hardy*, II, 391.

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— of real estate in another state and proceeds of sale. *McPike v. McPike*, VIII, 296.

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— For losses.

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— fund deposited in individual name. *Williams v. Williams*, III, 122.

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- Honest mistake in retaining stock till value depreciates. *Troup v. Rice*, I, 18.
- Investments taking funds out of jurisdiction of the court. *Ormiston v. Olcott*, II, 209.
- Omission to take security from purchaser. *Bowen v. Shay*, III, 512.
- Misappropriation of securities by agent. *Carpenter v. Carpenter*, I, 448.
- Not wholly dependent on good faith. *Spaulding v. Wakefield's Estate*, II, 14.
- Securities stolen from bank vaults. *Carpenter v. Carpenter*, I, 448.
- Securities left in custody of person entrusted with them by the testator. *McCabe v. Fowler*, II, 126.

Release and discharge.

- Authoritative and notorious act showing transfer of property to himself as trustee. *Crocker v. Dillon*, III, 46.
- Decree not questioned collaterally though reason stated insufficient. *Simpson v. Cook*, I, 27.
- Delay of creditor in presenting claim. *Gifford v. O'Connor*, VII, 225.
- Distribution *bona fide*. *Ward v. Kitchen*, I, 355.
- Distribution after expiration of time for presenting claims without special leave. *Brown v. Forsche*, I, 607.
- Legatee joining in mortgage of lands charged. *Thayer v. Finnegan*, III, 360.
- Only by open act in court. *White v. Ditson*, IV, 589.
- Payment to himself as guardian under void decree. *Potter v. Ogden*, VIII, 364.

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- Cannot convey to one not a creditor, title to personalty valid as against subsequently appointed administrator. *Rockwell v. Young*, III, 471.
- Purchaser from, cannot acquire valid title by limitation. *Rockwell v. Young*, III, 471.
- Selling chattels, purchaser may pay administrator. *Rockwell v. Young*, III, 471.

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- Depending on non-execution by first taker of absolute power of disposition vested in him. *Van Horne v. Campbell*, IV, 409.
- Gift depending on discretion of trustees, not. *Tilden v. Green*, VIII, 34.
- Of personal property not defeated by prior absolute gift without words of unlimited power of disposal. *Read v. Watkins*, III, 483.
- On devise to two, both dying without issue. *Pinkham v. Blair*, I, 114.
- On indefinite failure of issue void. *Hackney v. Smith*, VII, 343.
- To non-existent corporation. *Tilden v. Green*, VIII, 34.
- To surviving brother or brothers on death of devisee in fee without heirs of body. *Summers v. Smith*, VII, 118.
- To survivors of class of which first devisee is a member, not too remote. *Summers v. Smith*, VII, 118.

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FAMILY ALLOWANCE.

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- Interest on money not actually received, delay to invest not unreasonable. *Gott v. Culp*, II, 64.
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- Listing property of deceased ward for taxation. *Sommers v. Boyd*, VIII, 107.
- Not entitled to allowance for maintenance. *Horton's Appeal*, II, 151.
- Placing himself *in loco parentis* to ward. *Horton's Appeal*, II, 151.
- Purchasing indirectly at his own sale. *White v. Iselin*, I, 147.
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- Securities received from predecessor becoming worthless through extraordinary depression. *Jack's Appeal*, II, 185.
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- sufficiency of evidence to justify probate. *Wilbourn v. Schell*, II, 520.
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INCOME—(Continued).

- fixed sums payable out of rents and profits, when taking part of the corpus to make up a deficiency authorized. *Delaney v. Van Aulen*, II, 337.
- Legatee of, for life with power to use principal, and devise over at death, income from death of testator. *Ayer v. Ayer*, I, 604.
- of residuary or aliquot part. *Lawrence v. Security Co.*, VI, 502.
- Proceeds of sale of right to subscribe for additional stock not. *Biddle's Appeal*, III, 442.
- of part of franchise and permanent property of corporation, not. *Vinton's Appeal*, III, 231.

INFANT.

- Action by, after statute of limitations has run against guardian. *Culp v. Lee*, VIII, 128.
- Allowance to, out of interest on legacy payable at majority, with limitation over in case of previous death. *Flinn v. Flinn*, III, 560.
- Appointment of special guardian before service of citation. *Potter v. Ogden*, VIII, 364.
- Collateral attack by, on judgment confirming sale of land. *Palmerton v. Hoop*, VIII, 222.
- Compromise between guardian of legatee and executor. *Culp v. Lee*, VIII, 128.
- Decree in partition, conclusiveness. *Sites v. Eldridge*, VII, 373.
- Money loaned guardian on void mortgage executed under order of court. *Ray v. McGinnis*, III, 160.
- Service of citation. *Potter v. Ogden*, VIII, 364.

INJUNCTION.

- To restrain waste. *The University v. Tucker*, VI, 597.

INNOCENT PURCHASER.

- From executor or guardian purchasing at his own sale. *White v. Iselin*, I, 147.
- Pledgee from executor of securities of estate. *Wood's Appeal*, II, 285.

INSANITY.

- See also **MENTAL CAPACITY**.
- Burden of proving, after proof of due execution of will. *Frear v. Williams*, I, 85.
- that will was made under insane delusion. *Will of Cole*, I, 339.
- Caprice, fretfulness and a suspicious and irritable temper, *Will of Blakely*.
- Line between insane delusion and the unfounded and unreasonable suspicion of a sane mind. *Will of Cole*, I, 339.
- Of widow, election by court. *Van Steenwyck v. Washburn*, IV, 337.
- Partial derangement unconnected with the testamentary action. *Kingsbury v. Whitaker*, I, 245; *Will of Cole*, I, 339.
- Unfounded prejudices against testator's children. *Schneider v. Manning*, VI, 372.

Presumptions.

- In favor of sanity. *Will of Cole*, I, 339.

INSANITY—(Continued).

- In favor of testator. *Chrisman v. Chrisman*, VI, 156.
- Arising from proof of proper execution. *Frear v. Williams*, I, 85.
- Order appointing guardian for testator made a few hours after executing will. *Rice v. Rice*, III, 128.
- Will not irrational in its provisions. *Milton v. Hunter*, I, 521.
- Will wise in its provisions, drawn by testator subject to fits of insanity. *Kingsbury v. Whitaker*, I, 245.

Evidence.

- Declarations and admissions of co-devisee. *Hayes v. Burkam*, I, 179.
- Delusions not influencing provisions of will. *Rice v. Rice*, III, 128.
- Failing to show that will was influenced by the insane delusions. *Will of Cole*, I, 339.
- Letters written by testatrix. *Will of Blakely*, I, 234.
- Proof of insanity prior and subsequent to making will. *Estate of Toomes*, I, 275.
- Order adjudging testator unfit to manage his affairs and appointing guardian, made a few hours after will. *Rice v. Rice*, III, 128.
- Periodical epileptic attacks with convulsions, loss of consciousness and the usual consequences. *Brown v. Riffin*, I, 238.
- temporary pneumonia supervening such an attack with fever and delirium. *Brown v. Riffin*, I, 238.
- Statements by devisee that testator mentally incompetent. *Milton v. Hunter*, I, 521.
- That testator under guardianship and had previously been declared of unsound mind. *Estate of Johnson*, II, 524.

INTEREST.**See also INCOME, INTEREST ON LEGACIES.**

- Accessions on bequest of specified sum out of share of father's estate to which testatrix entitled. *Smith v. McKittrick*, I, 49.
- Administrator advancing money. *McPike v. McPike*, VIII, 297.
- Executor mingling assets with private moneys and using for individual benefit. *Troup v. Rice*, I, 18.
- Fund loaned by executor though directed to let it remain as unproductive capital. *Whitworth v. Ewing*, V, 469.
- Money not actually received by guardian. *Gott v. Culp*, II, 64.
- Highest rate, executor failing to show how much he received on fund deposited, and whether he mingled avails with his own funds. *Spaulding v. Wakefield's Estate*, II, 14.
- In judgment on contract payable to heirs. *Stevens v. Flannagan*, VIII, 260.
- Money unnecessarily deposited to create fund. *Spaulding v. Wakefield's Estate*, II, 14.
- Notes directed to be treated as advancements. *Porter's Appeal*, II, 234.
- Trustee neglecting to invest funds. *Lent v. Howard*, III, 109.

INTEREST ON LEGACIES.

- Allowance from, legacy payable at majority with limitation over in case of previous death. *Flinn v. Flinn*, III, 560.

INTEREST ON LEGACIES—(Continued).

- Acceptance of, on amount of original principal not bar to claim share in increase of value. *Monson v. New York Sec. & Tr. Co.*, VIII, 513.
- Annuity bears interest from testator's death. *Welsh v. Brown*, II, 221.
- Bequest, payable to trustee within year from testator's death at convenience of executors. *Bartlett v. Slater*, V, 180.
- Computed from year after probate though executor unable to pay before. *Vermont Baptist Convention v. Ladd*, V, 205.
- From one *in loco parentis*. *Townsend's Appeal*, IV, 432.
- General legacy. *State v. Crossley*, I, 418; *Welsh v. Brown*, II, 221.
- In lieu of dower. *Howard v. Francis*, I, 321; *Matter of Hodgman*, VIII, 472.
- In satisfaction of debt. *Welsh v. Brown*, II, 226.
- Legacy payable within eighteen months after date. *Thorn v. Garner*, VI, 518.
- Specific sum, interest payable to one annually for life with gift of principal over. *Welsh v. Brown*, II, 221.
- To an adult child. *Howard v. Francis*, I, 321.
- To executrix having cash on hand sufficient to pay it. *Handy v. Collins*, III, 570.
- To grandchildren. *Howard v. Francis*, I, 321.
- To a minor child. *Howard v. Francis*, I, 321.
- Waiver by acceptance of principal. *Matter of Hodgman*, VIII, 472.

INTERPLEADER.

- By executor between claimants of legacy under description applicable to both. *Morse v. Stearns*, II, 51.

INTERROGATORIES.

- Striking out. *Stevens v. Flannagan*, VIII, 260.

INTESTACY.

See, also, DESCENT AND DISTRIBUTION.

- As to interest in property, of which testator clearly ignorant. *Estrannord v. Barnum*, I, 160.
- As to lapsed and void devises. *Massey's Appeal*, I, 307.
- As to lapsed legacies in absence of residuary clause. *Mills v. Neubury*, V, 318.
- As to void devise in absence of evidence of intent that residuary devisee shall take. *Rizer v. Perry*, III, 303.
- statute that will shall pass all real estate. *Rizer v. Perry*, III, 303.
- By death of husband before wife, will devising estate to him for life, with gift over, if he survive testatrix. *Gibson v. Seymour*, IV, 517.
- By residuary bequest, with power of sale to executor in trust for payment of legacies violating statute. *Chamberlain v. Taylor*, V, 508.
- Gift of residue or any part of it failing. *Burnet v. Burnet*, I, 539.
- Partial, presumption. *Warner v. Willard*, V, 293.

INSOLVENCY.

- Of estate, effect on liability of administrator carrying out contract made by decedent. *Roach v. Ames*, III, 104.

INSOLVENCY—(Continued).

- of insolvent surety. *Lowell v. Estate of French*, II, 507.
- Of executor, as ground for removal. *McFadgen v. Council*, I, 458.
- Of trustee appointed by will, as ground for removal. *Williams v. Nichols*, V, 48.

INVESTMENTS.

- Careless or improvident, liability of trustee. *Crabb v. Young*, III, 265.
- Delay of guardian, if not unreasonable. *Gott v. Culp*, II, 64.
- Direction that partner be allowed to retain testator's share of capital for specified time at annual interest. *Denike v. Harris*, II, 364.
- In name of executor—improper. *Gilbert v. Welsch*, II, 302.
- Listing for taxation. *Sommers v. Boyd*, VIII, 107.
- Neglect to make within reasonable time. *Lent v. Howard*, III, 109.
- six months reasonable time. *Lent v. Howard*, III, 109.
- Executor not guarantor of safety. *McCabe v. Fowler*, II, 126.
- Supplement funds of estate with others. *Barry v. Lambert*, IV, 149.

How made.

- Bank stock under direction to put legacy at interest. *Gilbert v. Welsch*, II, 302.
- Creator of trust may designate security or dispense therewith. *Denike v. Harris*, II, 364.
- Direction to put legacy at interest to be strictly followed. *Gilbert v. Welsch*, II, 302.
- Direction to invest in productive funds upon good securities. *Ward v. Ketchen*, I, 355.
- In stock made by testator and retained by trustee. *Bowker v. Pierce*, II, 109.
- Taking funds out of jurisdiction of court. *Ormiston v. Olcott*, II, 209.
- no application to investment made by testator. *Ormiston v. Olcott*, II, 209.
- to security necessarily taken for existing debt. *Ormiston v. Olcott*, II, 209.
- Specific legacy in fund designated by will. *Ward v. Ketchen*, I, 355.
- Unpaid tax as incumbrance. *Crabbe v. Young*, III, 265.

Depreciation.

- Apprehended, in stocks in which a specified legacy is invested. *Ward v. Ketchen*, I, 355.
- Caused by events which could not be foreseen or controlled. *Crabb v. Young*, III, 265.
- Honest mistake in retaining stock till. *Troup v. Rice*, I, 18.
- Securities received by guardian from predecessor. *Jack's Appeal*, II, 178.

Apportionment.

- Accrued interest on purchase of bonds. *Hemenway v. Hemenway*, III, 429.
- Additional stock issued. *Brinley v. Grow*, IV, 324.
- Gain or loss on sale of stock. *New England Trust Co. v. Eaton*, IV, 368.
- Increase in value. *Monson v. New York Sec. & Tr. Co.*, VIII, 512.

INVESTMENTS—(Continued).

- Dividends payable in cash from earnings. *Richardson v. Richardson*, IV, 352.
- Net interest on bonds bought at a premium. *Hemenway v. Hemenway*, III, 429.
- Right to subscribe for additional stock. *Brinley v. Grow*, IV, 324.
- Premiums on purchase of bonds. *New England Tr. Co. v. Eaton*, IV, 368.
- Profits on sale at termination of life interest. *Matter of Gerry*, V, 55.

JOINT ADMINISTRATION.

- Not compelled against protest of any of the parties thereto. *Brubacker's Appeal*, III, 16.

JOINT EXECUTORS AND ADMINISTRATORS.

Duties.

- Not affected by probate in different states. *Hayes v. Pratt*, VIII, 349.
- One failing to qualify, power of sale. *Collier v. Grimesj*, II, 437; *Vernon v. Conville*, V, 184.
- Will contemplating sole management by wife until remarriage. *MacDonald v. Hanna*, VIII, 432.

Liabilities.

- Delivering entire management of estate to co-trustee, losses preventable by diligence. *Earle v. Earle*, III, 445.
- Due caution in respect to approval of and acquiescence in acts of co-trustees. *Earle v. Earle*, III, 445.
- Each principal as to own acts and surety as to other. *Caskie v. Harrison*, III, 309.
- Funds paid to and mis-appropriated by co-executor. *Croft v. Williams*, II, 479.
- Insolvency of co-executor, misappropriation of part purchase price paid on joint contract of sale. *Croft v. Williams*, II, 479.
- Joint receipt or joint release. *McKim v. Aubach*, II, 252.
- Loan by one on individual note to other and representation that money was to be used to pay debts of estate. *Croft v. Williams*, II, 479.
- Negligence of other not connected with or contributing to misappropriation by one. *Croft v. Williams*, II, 479.
- executors also trustee. *Ormiston v. Olcott*, II, 209.
- part purchase money paid to one in presence of other on joint contract. *Croft v. Williams*, II, 479.
- wife given sole control by will. *Mac Donald v. Hanna*, VIII, 432.
- Separate bond, loss by default of co-executor, without negligence on his part. *McKim v. Aubach*, II, 252.
- Receipt of legacy by trustee who is also executor. *Anderson v. Earle*, I, 472.

JOINT TENANTS AND TENANTS IN COMMON.

- Devise to one and her children. *Biggs v. McCarty*, III, 278.
- Direction that lands be equally divided. *Huston v. Read*, I, 501.
- Gift of income to four daughters to be divided share and share alike. *Monarque v. Monarque*, I, 494.
- Joint will by. *Betts v. Harper*, IV, 429.

JOINT WILL.

Tenants in common way unite in. *Betts v. Harper*, IV, 429.

To take effect on death of survivor. *Hershy v. Clark*, II, 464.

JUDGMENT.

Against administrator as evidence of assets in his hands. *Coates v. Mackey*, II, 181.

— in action in another state. *Braithwaite v. Harvey*, VIII, 571.

— not even prima facie. *Price v. Macer*, I, 73.

Against heir, effect of equitable conversion. *Eneberg v. Carter*, VII, 481.

Against person appointed executor. *Charles v. Jacobs*, I, 77.

Confirming sale of land. *Palmerton v. Hoops*, VIII, 222.

Effect of motion to amend void decree. *Potter v. Ogden*, VIII, 364.

In action to construe will, taken by consent. *Monarque v. Monarque*, I, 494.

In action to recover fund improperly paid by administrator c.t.a. appointed in foreign state. *Hayes v. Pratt*, VIII, 349.

In administering estate of living person represented deceased. *Melia v. Simmons*, I, 143.

Infant bound equally as adults. *Sites v. Ethredge*, VIII, 373.

In partition, not providing for contingent interests of unborn remaindemen. *Monarque v. Monarque*, I, 494.

Not against administrator personally on judgment against him in another state. *Coates v. Mackey*, II, 181.

Not lien on share of in estate which executor is expressly directed to sell after death of widow. *Jones v. Caldwell*, II, 154.

Of heirship in probate court of another state. *Morin v. Railroad*, IV, 462.

On debts contracted by administrator. *Rich v. Soroles*, VIII, 171.

On offer to allow. *Columbus Watch Co. v. Hodenpyl*, VIII, 316.

Setting aside for fraud. *Columbus Watch Co. v. Hodenpyl*, VIII, 316.

JUDICIAL SALES.

Executor purchasing under foreclosure of mortgage by him. *Lockman v. Reilly*, IV, 194.

Executor with power of sale purchasing under execution against testator. *Marshall v. Carson*, IV, 201.

Executor, etc., purchasing or interested, voidable. *White v. Iselin*, I, 147.

JURISDICTION.

Foreign executor, etc., bringing assets into state. *Whittaker v. Whittaker*, III, 58.

Actions in regard to legacies charged on land. *Williams v. Nichols*, V, 43.

Of action to set aside will for fraud and undue influence. *Post v. Mason*, III, 43.

Administration on estate of living person. *Melia v. Simmons*, I, 143.

Administration, petition showing non-residence in county but not in state.

Estate of Moore v. Moore, VIII, 100.

Administrator to account to courts of state of administration. *Woodruff v. Young*, II, 407.

Affected by division of counties. *Page v. Bartlett*, VIII, 465.

JURISDICTION—(Continued).

- Administrator's claim for maintenance of infant distributee. *Hyland v. Baxter*, IV, 478.
- Custody of estate acquired by administration. *Byers v. McAuley*, VIII, 444.
- Interfering with administration or its representative within state whose courts have jurisdiction. *Woodruff v. Young*, II, 407.
- Of administration, acquired on qualification of administrator. *Ackerson v. Orchard*, VIII, 525.
- Of county court in Nebraska to grant administration. *Estate of Moore v. Moore*, VIII, 100.
- Of estate, determined by domicile. *Succession of Gaines*, VIII, 479.
- Of probate court to construe will. *State v. Leland*, III, 118.
- on application for probate. *Graham v. Burch*, VIII, 11.
- in Michigan, V, 135.
- Record showing absence of jurisdictional facts. *Potter v. Ogden*, VIII, 364.
- Revocation of letters of administration. *Munroe v. People*, II, 470.
- To grant administration, presumption on collateral attack. *Lyne v. Sanford*, VIII, 26.
- To grant letters on petition of agent of legatee. *Russell v. Hartt*, II, 297.
- To take proof of will of non-resident without the state. *Russell v. Hartt*, II, 297.
- Validity of bequest in will of non-resident. *Van Gieson v. Banta*, V, 426.

JURY.

- Right to on appeal from grant or refusal of probate. *Schmidt v. Schmidt*, VIII, 140.
- Question for.**
- Mental capacity. *Chrisman v. Chrisman*, VI, 156.
- Testator's state of feelings towards those benefited by the will. *Canada's Appeal*, I, 1.
- Effect of conflicting testimony as to genuineness of signatures. *Beadle v. Alexander*, II, 173.
- Evidence conflicting as to alteration being made before or since execution. *Haynes v. Haynes*, I, 263.
- Special verdict if alteration is made after execution not invalidating will. *Haynes v. Haynes*, I, 263.

LACHES.

- Lapse of twenty years in asserting title or interest. *Bates v. Gillette*, VII, 423.
- Not imputed to vestry obtaining assent to gift at first session of legislature. *England v. St. George's Parish*, I, 466.

LAPSED BEQUESTS.

- Death of annuitant before its payment. *Anderson v. Hammond*, I, 545.
- Bequest to husband "and to his heirs and assigns forever" by death of husband before testatrix. *Kenniston v. Adams*, VII, 223.

LAPSED BEQUESTS—(Continued).

- Common law rules not changed by Act. Pa. Apr. 8, 1838. *Mussey's Appeal*, I, 307.
- Condition precedent unperformed. *Mills v. Newberry*, V, 318.
- Contingent estate for life lapsing, effect on contingent remainder in fee. *Robinson v. Female Orphan Asylum*, VI, 51.
- Devisee for life and remainderman, dying before testator. *Wooley v. Puzson*, VII, 602.
- Devise to husband providing that if he survived testatrix property should go to another and husband dying before. *Gibson v. Seymour*, 517.
- Gift of residue or any part of it failing. *Burnet v. Burnet*, I, 539.
- Husband not relative within statute to prevent. *Kenniston v. Adams*, VI, 223.
- Intestacy in absence of residuary bequest. *Mills v. Newberry*, V, 318.
- Legacy to one leaving adopted child. *Warren v. Prescott*, VIII, 286.
- Pass as part of residuary estate. *Burnet v. Burnet*, I, 539.
- Share in, barred by acceptance of provision in lien of dower. *Matter of Benson*, IV, 17; *Matter of Hodgman*, VIII, 472.
- Not part of residuary estate unless special intent apparent. *Mussey's Appeal*, I, 307.
- To one or her descendants, devisee dying without issue before testator. *Huston v. Read*, I, 501.

LARCENY.

- By agent of executor and trustees. *Carpenter v. Carpenter*, I, 448.

LEASE.

- For ninety years renewable forever by life-tenant with power to make change of investments, etc. *Collins v. McFavish*, IV, 586.

LEGACY TO CREDITOR.

- Bequest to wife in lieu of dower "or any other claim she may have against estate." *Rustling v. Rustling's Adm'r*, V, 251.
- Declaration of testator that legacies were intended as payment. *Reynolds v. Robinson*, I, 583.
- Presumption of intention to satisfy debt, when does not arise. *Reynolds v. Robinson*, I, 583.

LEGACY TO DEBTOR.

- Direction to cancel notes "I hold," applies only to those held at time of making will. *Updike v. Thomas*, II, 31.
- not to those of firm of which legatee a member. *Waterman v. Alden*, VIII, 193.
- to pay of indebtedness of brother to estate of husband applied to note made by brother in name of another as agent. *Scott v. Neeves*, VII, 519.
- Giving all books, papers, etc., relating to certain claims to person interested, to use in his discretion, not a release of claim for services rendered in connection with them. *Sloane v. Stevens*, VI, 1.
- Direction to release all claims and demands against persons named in this will, not release of person named in codicil only. *Sloane v. Stevens*, VI, 1.

LEGACIES.

See, also, ABATEMENT OF LEGACIES, ADEMPMENT OF LEGACIES, BEQUESTS, CHARGE ON REALTY, CONDITIONS, CUMULATIVE BEQUESTS, DEMONSTRATIVE LEGACIES, GENERAL LEGACIES, INTEREST ON LEGACIES, LEGACY TO CREDITOR, LEGACY TO DEBTOR, LIFE ESTATE, PERSONALTY, RESIDUARY BEQUESTS, SPECIFIC LEGACIES, TRUST.

Acceptance by legatee of less sum than due after dispute as to interest. *Vermont Baptist Convention v. Ladd*, V, 205.

Direction to diminish, by amount charged on testator's books against legatee. *Robert v. Corning*, III, 178.

Direction to put at interest must be strictly followed. *Gilbert v. Welsche*, II, 302.

Gift of fixed sums payable out of rents and profits; taking part of the corpus to make up a deficiency. *Delancy v. Van Aulen*, II, 337.

Overpayment of, action for refunding barred by allowance of credit. *Matter of Hodgman*, VIII, 472.

Payment by note of devisee accepted by legatee. *Nevius v. Gourley*, I, 53.

Payment of, to husband of legatee. *Nevius v. Gourley*, I, 53.

Payment of disputed, without final accounting with all the parties. *Riggs v. Cragg*, III, 391.

Power to determine time and amount of payments conferred on executors. *Pedrick v. Pedrick*, VIII, 425.

Request by testator, to bookkeeper, to take charge of books of estate at a fixed salary as long as may be necessary. *Harker v. Smith*, IV, 525.

To one or his descendants, absolute gift. *Hustor v. Read*, I, 501.

Property.

"All of the household property in the dwelling house." *Frazer's Accounting*, III, 258.

"All the ready money I may have, either in bank or elsewhere at my decease," includes legacy collected by husband after execution of will. *Smith v. Burch*, III, 236.

Certain property and \$3,000, and \$2,000 more, if so much left of the remaining estate of testatrix's husband. *Foster v. Smith*, VIII, 268.

Dividends and income of certain stocks to be kept as a permanent fund, gift of stock. *Angell v. Springfield Home*, VIII, 321.

Everything belonging to a certain store. *Kelly v. Richardson*, VIII, 397.

Life insurance payable to wife, or in event of prior death to children, does not pass as her personal property. *Evans v. Opperman*, VII, 550.

— nor under bequest of her interest in community property. *Evans v. Opperman*, VII, 550.

Money in bank, when does not pass by bequest of all personal property with specified exceptions. *Kelly v. Richardson*, VIII, 397.

— of stock and everything belonging in specified store. *Kelly v. Richardson*, VIII, 397.

— by general words, such as "goods and chattels." *Peaslee v. Fletcher*, VII, 217.

LEGACIES—(Continued).

- "Ornaments" includes jewelry used for personal decoration. *In re Traylor*, VI, 67.
- Specified sums of money, "the income only expended annually," absolute gift of those sums of money. *Dascomb v. Marston*, VI, 248.
- Stock bequeathed to testatrix, but not standing in her name. *Angell v. Springfield Home*, VIII, 321.
- Stock in a bank, in which testatrix owned no stock, but in which she had bonds on deposit. *Clark v. Atkins*, IV, 97.
- Use of homestead and furniture. *Angell v. Springfield Home*, VIII, 321.

LIFE ESTATES.

- See, also, CONDITIONS, ESTATE IN FEE, INVESTMENTS, REMAINDERS.
- Devisee of estate on condition must pay taxes. *Garland v. Garland*, II, 848.
- Executor given property for life, trustee for other beneficiaries. *Cummings v. Corry*, V, 223.
- Life tenant mingling property with her own. *Cox v. Wills*, VIII, 356.
- Remainderman may maintain suit against life tenant for protection of his interest. *Goudie v. Johnston*, V, 351.
- Taking clay from soil, manufacturing and selling, waste. *The University v. Tucker*, VI, 597.

How created.

- By devise "for his support and estate, to be and remain bequeathed to his children. *Oyster v. Oyster*, III, 372.
- By direction that portion of a share be invested and income paid to legatee for life, with gift over at his death. *Davies v. Davies*, VI, 361.
- By direction to invest fund and pay interest, with limitation over in case of death without issue. *Pierce v. Hubbard*, VIII, 333.
- that on payment of interest annually on what he owes, he be not disturbed in his possession of the place. *Garland v. Garland*, II, 848.
- By gift to one "for and during his life and after his death to his sons and their heirs." *Walker v. Lewis*, VIII, 413.
- By limiting remainder. *Goudie v. Johnston*, V, 351.
- By trust to apply net proceeds among children, and on death of one or more, to lineal descendants. *Henderson v. Henderson*, V, 19.
- Devise to son during his life time, and after his death to the heirs of his body begotten in lawful wedlock. *Millett v. Ford*, V, 384.
- By gift of the income for life. *Sampson v. Randall*, II, 1.
- "so long as she remains the widow." *Cooper v. Pogue*, II, 196.
- to legatees and the survivors, and gift of fund to others. *Davis' Appeal*, III, 546.
- Use of property to wife, income to four daughters, to be divided between them during their natural lives. *Monarque v. Monarque*, I, 494.
- Devise "to remain hers so long as she shall remain unmarried." *Nash v. Simpson*, V, 357.
- Devise "with right to use, sell, or otherwise dispose of, and the income and increase thereof according to will and pleasure during life time." *Stuart v. Walker*, II, 89.

LIFE ESTATE—(Continued).

Remainder for life in specified property after life estate of wife, codicil giving remainderman the profits of the estate not given to wife. *The University v. Tucker*, VI, 597.

Power of disposal, effect of.

Absolute, annexed to gift expressly for life, with limitation over. *Stuart v. Walker*, II, 79; *Hospital Trust Co. v. Commercial Bank*, IV, 563.

Bequest for life, and gift over of remainder. *Smythe v. Smythe*, VIII, 558.

Bequest of money for use and support of legatee for life, and gift over of any part remaining. *Copeland v. Barron*, II, 190.

Bequest to wife "with right to sell the estate if that be her choice, and after her death the property to be parted to my children." *Jones v. Jones*, V, 306.

Conditional, annexed to devise not stating nature of estate, with a limitation over. *Stuart v. Walker*, II, 79.

— annexed to express gift for life. *Copeland v. Barron*, II, 190.

— authority to dispose of enough for support if necessary. *Morford v. Diffenbach*, V, 185.

— for the own use and benefit of devisee. *Walker v. Pritchard*, VI, 381.

— "in case of necessity to sell any part of the estate for her support and maintenance." *Nash v. Simpson*, V, 357.

Devise for life, with power of appointment among heirs. *Patrick v. Morehead*, II, 261.

Devise during life for her maintenance, but not to sell the same, to go to J. M. at her death, if any remains. *Birmingham v. Lesan*, IV, 268.

Estate not enlarged unless construction absolutely necessary. *Wetter v. Walker*, I, 519.

Charges and conditions.

Bequest to wife during life or widowhood, with gift over of what remains and direction that she bring up the children. *Foot v. Saunders*, II, 73.

Charge on legatees to provide for their father if he became destitute. *Johnson v. Johnson*, II, 281.

Condition that out of property, devisee shall support and educate the children. *Estate of Oertle*, V, 398.

Rights and powers.

Conveyance by tenant for life with power to convey in fee. *Baird v. Boucher*, III, 467.

Increase of live stock. *Leonard v. Owen*, VIII, 567.

In investments, see INVESTMENTS.

Interest in residuary funds, no time being named, from what time computed. *Weld v. Putnam*, I, 202.

Lease for ninety-nine years renewable forever, under power to make changes of investment and reinvestment. *Collins v. MacTavish*, IV, 586.

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- Mishomer of decedent in land certificate. *Lyne v. Sanford*, VIII, 26.
- Notice of application, collateral attack on ground of failure to give. *Lyne v. Sanford*, VIII, 26.
- Omission to attach exhibit to application. *Lyne v. Sanford*, VIII, 525.
- Omission to comply with statute, curative act. *Ackerson v. Orchard*, VIII, 525.
- Omission to inventory land. *Lyne v. Sanford*, VIII, 26.
- Ordered for payment of family allowance and expense of administration.
Ackerson v. Orchard, VIII, 525.
- Purchase by assignee of life estate of husband, as merger. *Shelton v. Hadlock*, VIII, 289.
- Petition for resale referring to original petition. *Bateman v. Reitter*, VIII, 598.
- Verification of supplemental statement. *Ackerson v. Orchard*, VIII, 525.
- What to be shown by purchaser at. *Shelton v. Hadlock*, VIII, 289.

SHELLEY'S CASE, RULE IN.

- Applied to executory trusts, only in cases literally within it. *Henderson v. Henderson*, V, 19.
- Devise for life with power of appointment to heirs and devise over on death without issue. *Patrick v. Morehead*, II, 261.
- Devise of rents and profits until youngest child of devisee becomes of age, the fee simple then to vest in the devisee "and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest." *Shimer v. Mann*, IV, 310.
- Devise to one "during her natural life and after her death to the begotten heirs or heiresses of her body." *Leather v. Gray*, VI, 72.

SHELLEY'S CASE, RULE IN—(Continued).

In force in Indiana. *Allen v. Craft*, V, 365.

Intent to give first taker estate for life only, and words: issue, sons, children descendants used. *Henderson v. Henderson*, V, 19.

Not allowed to defeat plain intention of testator. *Millett v. Ford*, V, 384.

Not apply to devise to wife and after her death and after the youngest child then living shall arrive at the age of twenty-one years to be divided between the children. *Stilwell v. Knapper*, I, 211.

Not rigidly applied in Maryland. *Henderson v. Henderson*, V, 19.

SIGNATURE.

Acknowledgement, what sufficient. *Ludlow v. Ludlow*, III, 241.

— by silence. *Luper v. Werts*, VII, 243.

— or adoption in presence of the witnesses. *Will of Convey*, I, 90; *Haynes v. Haynes*, I, 263.

— not required to be in any particular form. *Haynes v. Haynes*, I, 263.

By mark in presence of witnesses. *Robinson v. Brewster*, VIII, 235.

— not restricted to case of illiteracy. *Davis v. Semmes*, VII, 36.

Drawing scrolls through. *Gay v. Gay*, III, 540.

Made by another, adopted by acknowledgement of execution of will. *Herbert v. Berrier*, III, 154.

— signing and authority in absence of the witnesses. *Will of Convey*, I, 90; *Haynes v. Haynes*, I, 263.

Marking out by pencil lines. *Woodfill v. Patton*, II, 200.

Of witness by mark, person writing name not signing his own. *Davis v. Semmes*, VII, 36.

Shown by other than subscribing witnesses. *Will of Convey*, I, 90.

Place of.

At bottom of first page and top of second or last place over important provisions. *Will of Hewitt*, III, 58; *Will of O'Neil*, III, 135.

At end of attestation clause. *Younger v. Duffie*, IV, 544.

At end of third page of four page will. *Baker's Appeal*, IV, 128.

In holographic will. *Succession of Armant*, VII, 361.

Of subscribing witnesses. *Fowler v. Stagner*, II, 484.

Preceding clause appointing executors. *Appeal of Wineland*, VI, 349.

Preceding date. *Flood v. Pragoff*, III, 69.

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Common law marriage between. *Scott v. Raub*, VIII, 82.

Legitimation of children. *Scott v. Raub*, VIII, 82.

SPECIAL GUARDIAN.

See, also, GUARDIAN AD LITEM.

Appointment of, before service of citation. *Potter v. Ogden*, VIII, 364.

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Of contract in form of will. *Bolman v. Overall*, VI, 59.

SPECIFIC BEQUESTS.

See, also, DEMONSTRATIVE LEGACIES, GENERAL BEQUESTS.

SPECIFIC BEQUESTS—(Continued).

- What are. *Kelly v. Richardson*, VIII, 397.
- "All my personal property." *Miller v. Cooch*, VI, 435.
- Continuance of investment in stocks designated. *Ward v. Kitchen*, I, 355.
- Devises and legacies abate ratably. *Maybury v. Grady*, III, 375.
- Direction that recovery on a claim be paid in specified proportions. *Maybury v. Grady*, III, 375.
- Direction to reserve and keep invested sum sufficient to produce four hundred dollars to be paid to one for life, principal to revert. *Emery v. Batchelder*, V, 377.
- Dividends and income of certain stocks to amount of ten thousand dollars. *Angell v. Springfield Home*, VIII, 321.
- Everything belonging in a certain store. *Kelly v. Richardson*, VIII, 397.
- Eighty one shares of a company now standing in my name on its books, testatrix then owning eighty one shares of par value of fifty dollars, but at the time of her death, eighty-one shares of one hundred dollars. *Fidelity Trust Company's Appeal*, IV, 556.
- Five thousand dollars W. C. R. Co. bonds, testator owning five such bonds of the face value of \$1,000 each, but selling at thirty per cent. *Kunkel v. McGill*, II, 132.
- Gift of one thousand shares of bank stock to be sold by executors and proceeds divided in certain proportions, with provision for deduction for subsequent advancements to be made to any of the legatees. *In re Zeile*, VI, 103.
- Legacies held demonstrative. *Bradford v. Brinley*, VI, 279.
- Of stocks, carries dividends subsequent to death, *Angell v. Springfield Home*, VIII, 321.
- Pecuniary legacy to daughter preceded by gift of gold watch to another, both children receiving equal provisions in other clauses. *Bliven v. Seymour*, II, 447.
- Specified sum to be paid out the share of an estate to which testatrix entitled. *Smith v. McKitterick*, I, 49.
- Stocks aggregating less than number owned. *Metcalf v. First Parish of Farmingham*, I, 11.
- Thing not in existence or owned by testator at date of will. *Fidelity Trust Company's Appeal*, IV, 556.

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- Adopting from another state. *Estate of Pike*, I, 332.
- Cause of action given by, suit in another state. *Higgins v. Central N. E. & C. R. Co.*, VIII, 310.
- Conferring testamentary capacity on married women, not repeal of provision for revocation by marriage. *Brown v. Clark*, I, 510.
- Passed after death of testator, inoperative as to will attested by incompetent witnesses. *Giddings v. Turgeon*.
- Subject stated in title. *Calloway v. Cooley*, VIII, 360.
- Validating sales of land on defective petition or notice. *Ackerson v. Orchard*, VIII, 525.

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Apprehended depreciation in the stocks which a specific legacy is invested.

Ward v. Kitchen, I, 355.

Held by testator's brokers and sold to repay advances. *Pomeroy v. Mills*, III, 585.

Honest mistake in retaining until value depreciates. *Troup v. Rice*, I, 18.

Legacies of, aggregating less than number of shares owned. *Metcalf v. First Parish of Farmingham*, I, 11.

Pledged by executor for his personal debt. *Hoods Appeal*, II, 285.

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Additional, part of corpus. *Brinley v. Grou*, IV, 324.

— option to subscribe. *Brinley v. Grou*, IV, 324; *Matter of Kernochan*, V, 260.

— proceeds of sale of right. *Biddle's Appeal*, III, 442; *Brinley v. Grou*, IV, 324.

Dividends declared after testator's death from earnings previously accumulated belong to life tenant. *Matter of Kernochan*, V, 260.

— declared before but payable after. *Matter of Kernochan*, V, 260.

— payable in cash from earnings. *Richardson v. Richardson*, IV, 332.

Proceeds of sale of franchise and permanent property of corporation divided among stockholders. *Vinton's Appeal*, III, 231.

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Mortgage by guardian under void order. *Ray v. McGinness*, III, 160.

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— not rebutting presumption arising from attestation clause. IV, 442.

— to produce. *Abbott v. Abbott*, I, 326.

— formal request to sign. *Herbert v. Berrier*, III, 154.

Knowledge that paper signed is a will. *Canada's Appeal*, I, 1; *Will of Hulse*, I, 352; *Flood v. Pragoff*, III, 69.

Place of signature immaterial. *Fowler v. Stagner*, II, 484.

Place at bottom of first page and top of second or last place over important provisions. *Will of Hewitt*.

Testimony of, effect to be given on question of due execution. *Webb v. Dye*, II, 558.

— rebuttable by other evidence, direct or circumstantial. *Webb v. Dye*, II, 558.

— if insufficient, execution shown by other evidence. *Luper v. Werts*, VII, 243.

SUBSCRIBING WITNESS—(Continued).

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- Corporator of devisee organized for purely charitable purpose. *Quinn v. Shields*, IV, 386.
- Church residuary devisee, vestryman. *Drake's Appeal*, I, 227.
- Executor and his wife. *Stewart v. Harriman*, I, 95.
- Husband of legatee as, in Vermont, prior to statute of 1884. *Cuddings v. Turgeon*, V, 201.
- Legatee under nuncupative will. *Vrooman v. Powers*, VII, 611.
- not made competent by renunciation. *Vrooman v. Powers*, VII, 611.
- Must be competent at time of attestation, effect of subsequent statute. *Vrooman v. Powers*, VIII, 611.
- One receiving a trivial legacy, but deprived of a large estate as heir. *Smalley v. Smalley*, I, 566.
- Stockholder of corporation legatee. *Marston et al. Petitioners*, VI, 229.
- Taxpaying resident of town, will containing bequest to town in trust. *Marston et al. Petitioners*, VI, 229.
- To nuncupative will not understanding language in which testator spoke. *Succession of Dauterive*, VII, 181.

SURVIVAL OF ACTION.

- Death by wrongful act. *Higgins v. Central N. E. & W. R. Co.*, VIII, 810.

SURVIVORSHIP.

- Testator and devisees perishing by same catastrophe. *Will of Cole*, VII, 80.

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- Devisee of life estate on condition must pay. *Garland v. Garland*, II, 348.
- Listing property of deceased ward. *Sommers v. Boyd*, VIII, 107.
- Unpaid taxes not an incumbrance within meaning of phrase "unincumbered real estate." *Crabb v. Young*, III, 265.

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- Age required in Oregon. *Luper v. Werts*, VII, 243.
- Insurance in mutual benefit society. *Holland v. Taylor*, VI, 536.
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- Statute conferring, on married women. *Brown v. Clark*, I, 510.

TOMBSTONES AND MONUMENTS.

- Direction to appropriate residue. *Bainbridge's Appeal*, II, 112.
- Erected before grant of administration. *Samuel v. Estate of Thomas*, II, 100.
- Erection and repair. *Fite v. Beasley*, IV, 274.
- For married women. *Matter of Weringer*, VIII, 439.
- Preservation, embellishment and repair. *Bates v. Bates*, III, 212.

TRUST.

- Creator may designate investment of fund. *Denike v. Harris*, II, 364.
- Does not suspend power of alienation unless sale would be in contravention of terms. *Robert v. Corning*, III, 178.
- Effect on rights under, of accounting by executor. *Monson v. New York Sec. & Tr. Co.*, VIII, 512.
- Execution, will proved in different states. *Hayes v. Pratt*, VIII, 349.
- General intention to benefit a class to be selected, omission to exercise power. *Mills v. Newberry*, V, 318.
- Purpose having ceased, title vests without conveyance. *Watkins v. Reynolds*, VII, 442.
- Resulting trust for next of kin by gift to executors on trust, void for uncertainty. *Nichols v. Allen*, II, 369.
- Rule in Shelley's case, application of. *Henderson v. Henderson*, V, 19.
- Separability of trusts for use of daughters and their heirs. *Slade v. Patten*, I, 346.
- To invest in such stocks or other productive property as executors deem advisable, how properly constituted. *Carpenter v. Carpenter*, I, 448.
- With alternative ulterior provision, what is not. *Tilden v. Green*, VIII, 34.

Creation.

- Bequest of income to one for her own use, and for the education and support of her children. *Sturgis v. Paine*, VI, 294.
- Bequest to wife of fixed sum per month, for support and maintenance of herself and daughter. *Blonin v. Phaeneuf*, VI, 326.
- Bequest to widow on condition that she pay fifty dollars yearly to daughter. *Crawford v. Thompson*, IV, 57.
- Bequest to widow, "believing that she will make a will and it is my will that." *Cox v. Wills*, VIII, 356.
- Charging life estate with payment of debts, expenses and legacies. *Dill v. Wisner*, II, 509.
- Charging property with support of sisters. *Alsop v. Clarke*, V, 497.
- Devise "to be disposed of by him for such charitable purpose as he shall think proper." *White v. Ditson*, IV, 589.
- Directions that what remains at death of legatee, shall be bequeathed for the support and management of certain institutions. *Quinn v. Shield*, IV, 386.
- Executor given use of property for life. *Cummings v. Corey*, V, 223.
- to distribute to such persons, societies or institutions, as they may consider most deserving. *Nichols v. Allen*, II, 369.
- in trust void for uncertainty, next of kin take by way of resulting trust. *Nichols v. Allen*, II, 369.
- First taker given power of withdrawing any part of subject from the object, or of applying it to his own use. *Mills v. Newberry*, V, 318.
- Gift to daughter of use of specified sum for life, principal to go to her children. *Bliven v. Seymour*, II, 447.
- In favor of legatee, under previous will executed for valuable consideration. *Bolman v. Overall*, VI, 59.

TRUSTS—(Continued).

Language merely precatory. *Colton v. Colton*, VI, 11.

Legacy to be paid to a daughter "and her children in trust." *Mosby v. Paul's Adm'r*, VIII, 177.

Separate equitable estate no particular form of words necessary. *Robinson v. Randolph*, V, 447.

— inferred from provisions as to mode of enjoyment. *Robinson v. Randolph*, V, 447.

Technical language not necessary. *Colton v. Colton*, III, 11.

What necessary to create. *Mills v. Newberry*, V, 318.

—Request.

"Only requesting her, at the close of her life" to make certain disposition. *Foose v. Whitmore*, I, 577.

That at her death she give said lands to certain relatives. *Handley v. Wrightson*, III, 530.

— she will divide between specified persons. *Knox v. Knox*, IV, 46.

That in event of remarriage wife will see that the interests of the children in the property are protected. *Sale v. Thornberry*, VI, 149.

To make such gift and provision for mother and sister, as in her judgment will be best. *Colton v. Colton*, III, 11.

"To use said fund to further the Woman's Rights cause, but neither of them is under any legal responsibility to do so." *Bacon v. Ransom*, IV, 365.

Validity.

See, also, CHARITABLE BEQUESTS, PERPETUITIES.

Bequest to town to establish a school fund. *Piper v. Moulton*, II, 574.

Defined beneficiary essential. *Holland v. Alcock*, VI, 188.

Definiteness and certainty of objects and purposes essential. *Tilden v. Green*, VIII, 34.

Devise on trust too indefinite for execution. *Fairfield v. Lawson*, IV, 36.

Devise to daughters and their heirs to be paid to trustees to hold, manage and dispose of, for the use and benefit of the daughters and their heirs. *Slade v. Patten*, I, 346.

For maintenance and education of granddaughter on condition that she is educated in a Roman Catholic school and raised in that faith. *Magee v. O'Neill*, III, 591.

For payment of legacies in violation of statute, with power of sale for that purpose, no title in trustee. *Chamberlain v. Taylor*, V, 508.

"To be equally divided between her near relatives and mine." *Handley v. Wrightson*, III, 530.

To distribute to such persons, societies or institutions as executors may consider most deserving. *Nichols v. Allen*, II, 369.

To pay income to one "into his own hands, and not into another, whether claiming by his authority or otherwise." *Smith v. Towers*, VI, 589.

Trustee no power of control or disposition. *Allen v. Craft*, V, 365.

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By appellate court in probate proceedings. *Graham v. Burch*, VIII, 11.

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By paper invalid as a will. *Byers v. McAuley*, VIII, 444.

For fraud and undue influence, in procuring will. *Post v. Mason*, III, 43.

Decree of distribution not bar to action to declare. *Colton v. Colton*, VI, 11.

Beneficiaries.

Fraudulently obtaining possession of property from trustee. *Crocker v. Dillon*, III, 406.

Near relatives of wife and testator. *Handley v. Wrightson*, III, 530.

Son's wife and family. *Stuart v. Stuart*, II, 527.

To be paid to one "into his own hands, and not into another, whether claiming by his authority, not assignable or subject to creditors. *Smith v. Towers*, VI, 589.

Duration.

For son's wife and family. *Stuart v. Stuart*, II, 527.

To pay income to son for support of himself and daughter. *Matter of Smith*, VIII, 199.

Property subject.

Additional property given by codicil, trust created by will. *Buchanan v. Loyd*, V, 30; *Reid v. Walbach*, VIII, 131.

Created as to "property hereinbefore given" does not apply to property given by residuary bequest. *Reid v. Walbach*, VIII, 131.

Direction for investment and payment of income to certain persons and the survivors, and on the death of the last survivor divide fund among testator's heirs. *Davis' Appeal*, III, 548.

Gift of income of share of life estate, trust created by residuary clause. *Terry v. Smith*, V, 277.

TRUSTEES.

See, also, CHARITABLE BEQUESTS, COMMISSIONS, COMPENSATION, EXECUTORS, AND ADMINISTRATORS, TRUSTS.

Estate of, not enlarged by power of sale. *Matter of Tienken*, VIII, 157.

Executor can discharge himself as such only by open act in court. *White v. Ditson*, IV, 589.

Executors performing duties of. *Webster v. Morris*, V, 158.

Removal, on what grounds. *Williams v. Nichols*, V, 43.

— jurisdiction of equity. *Williams v. Nichols*, V, 43.

Title of, commensurate with equitable estate bestowed. *Matter of Tienken*, VIII.

Appointment.

Administrator c. t. a. does not become. *Terry v. Smith*, V, 277; *Hayes v. Pratt*, VIII, 349.

Acceptance of executorship, assumption of trusts vested in executor. *Earle v. Earle*, III, 445.

Appointed by will, when not required to give bond. *Williams v. Nichols*, V, 43.

— insolvency not ground of removal. *Williams v. Nichols*, V, 43.

Authoritative and notorious act showing transfer of property from himself

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- as executor, necessary to show acceptance. *Crocker v. Dillon*, III, 46.
- Co-executor appointed by codicil, when not co-trustee of trusts created by will. *Simpson v. Cook*, I, 27.
- Executor, beneficiary. *Cummings v. Corey*, V, 223.
- Executors, by instructions to invest a fund or to pay or set aside. *Randolph v. Randolph*, V, 406.
- Municipal corporation as. *Peynado v. Peynado*, V, 488.
- Payment of trust money to co-executor and taking his receipt as trustee, evidence of renunciation. *Anderson v. Earle*, I, 472.
- Qualifying as executor, as proof of acceptance. *Simpson v. Cook*, II, 27.
- Receipt of legacy by trustee and executor. *Anderson v. Earle*, I, 472.
- Successor under trust for charitable purposes, masses, etc. *Matter of Schouler*, III, 249.
- Towns or cities, of funds given for purpose of education. *Piper v. Moulton*, II, 576.
- Will providing for substitution on death of first named. *Hayes v. Pratt*, VIII, 349.

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- Action to recover possession of property conveyed. *Bromley v. Mitchell*, VIII, 229.
- Devises in trust afterwards designated as executors, part only qualifying. *DeSaussure v. Lyons*, I, 295.
- Pledge of securities of estate. *Nugent v. Laduke*, III, 188.
- Purchase by leave of court of trust property in which interested. *Scholle v. Scholle*, IV, 496.
- Retention from income of amount of property fraudulently obtained by beneficiary from predecessor and converted. *Crocker v. Dillon*, III, 406.
- Selecting beneficiaries of fund for relief of most deserving poor. *Hesketh v. Murphy*, III, 7.
- by appointee of court. *Tuppen's Appeal*, V, 193.
- under bequest for poor in such manner as court shall direct. *Hunt v. Fowler*, VI, 444.
- Under direction to allot and set apart shares of a specified amount and value. *Monson v. New York Sec. & Tr. Co.*, VIII, 512.

Liabilities.

- Appropriation of securities by agent. *Carpenter v. Carpenter*, I, 448.
- Delivering entire management of estate to co-trustees. *Earle v. Earle*, III, 445.
- Depreciation in value of securities caused by events which could not be foreseen or controlled. *Crabb v. Young*, III, 265.
- Due caution in respect to approval of and acquiescence in acts of co-trustees. *Earle v. Earle*, III, 445.
- Improvident or careless investment, exemption except for wilful default, misconduct or neglect. *Crabb v. Young*, III, 265.
- Investments taking funds out of jurisdiction of court. *Ormiston v. Olcott*, II, 209.

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- rule no application to investments made by testator. *Ormiston v. Olcott*, II, 209.
- no application to security necessarily taken for existing debts. *Ormiston v. Olcott*, II, 209.
- Loss of securities by robbery of bank vault. *Carpenter v. Carpenter*, I, 448.
- Neglecting to invest within reasonable time. *Lent v. Howard*, III, 109.
- Retaining investment in stock made by testator. *Bourke v. Pierce*, II, 109.

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- Action to charge executors as trustees. *Post v. Mason*, III, 43.
- Action to set aside will. *Post v. Mason*, III, 43.
- Any, ground for setting aside will. *In re Cahill*, VI, 96.
- Arising from confidential relations between testatrix and her pastor and his wife in whose family she boarded. *Schofield v. Walker*, V, 211.
- By person other than beneficiary. *In re Cahill*, VI, 96.
- Codicil by person of impaired faculties, changing will in favor of confidential adviser. *Yordley v. Cuthbertson*, V, 562.
- Constraint must operate in act of making will. *Wainwright's Appeal*, I, 43.
- Defined. *Schofield v. Walker*, V, 211.
- Requirements of technical morality. *Schofield v. Walker*, V, 211.
- Modest persuasion, arguments addressed to the understanding, or mere appeal to the affections. *Schofield v. Walker*, V, 211.
- What is, to avoid will. *Schmidt v. Schmidt*, VIII, 140.
- Will written by confidential friend of testator and husband of legatee. *Montague v. Allan's Ex'rs*, IV, 454.
- Will containing provision in favor of draughtsman, who was testator's counsel. *Post v. Mason*, III, 43.

Evidence, admissibility.

- Declarations of legatee made after execution of will. *Will of Ames*, I, 35.
- of one devisee as against others. *Hayes v. Burckham*, I, 179.
- Declarations of testator. *Canada's Appeal*, I, 1.
- as to influence of beneficiary. *Potter v. Baldwin*, III, 292.
- as to intended disposition of property. *Will of Storer*, II, 327.
- as to intended discrimination. *Dye v. Young*, II, 315.
- showing state of his feelings toward those benefited. *Canada's Appeal*, I, 1.
- of a desire to see his son, and that he did not know but that he had been deceived. *Potter v. Baldwin*, III, 292.
- made after execution of the will. *Milton v. Hunter*, I, 521.
- Estrangement and ill will between the testatrix and one devisee for years previous. *Mooney v. Olsen*, I, 65.
- Instructions to draughtsman. *Nelson v. McClanahan*, I, 411.
- State of testator's feelings toward beneficiaries. *Canada's Appeal*, I, 1.
- That wife of testator, one of those preferred by the will, had great control over him in the ordinary affairs of life. *Will of Storer*, II, 327.

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Wider range of inquiry than in ordinary litigation. *Mooney v. Olsen*, I, 65.

That will is unequal in distribution, the testator being of impaired mind and memory. *Will of Storer*, II, 327.

— **Weight.**

Direct proof not essential. *Drake's Appeal*, I, 227.

Exercise of, need not be proved, to satisfaction of jury. *Silton v. Hunter*, I, 521.

— not shown by mere existence of improper influence. *Munderland v. Hood*, V, 433.

Inferred from circumstances. *Drake's Appeal*, I, 227.

Misdescription of relatives, as bearing on mental capacity. *Drake's Appeal*, I, 227.

Provisions of will and mental capacity of testator. *Will of Cole*, I, 90.

That large amount is given to church, of which person drawing will is a vestryman, deeply interested in its welfare and a liberal contributor. *Drake's Appeal*, I, 227.

Unlawful cohabitation of testator with a woman represented by him as his wife, and that she had falsely accused him of having seduced her. *Wainwright's Appeal*, I, 43.

That brothers and sisters of testator (an unmarried man), living but a few miles from him, were not notified of his sickness and were not present at the making of the will, by which they received but a small portion of his estate. *Drake's Appeal*, I, 227.

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Bonus paid to guardian, on loan of ward's money. *Fellows v. Longyor*, III, 97.

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Estoppel of attorney for vendor to set up title. *Little v. Giles*, VII, 312.

Vendor agreeing to pay purchase money by paying debts of vendee. *Watkins v. Reynolds*, VII, 442.

Sale of real estate by an executor, etc., at which he purchases through another or is interested. *White v. Iselin*, I, 147.

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Inoperative bequest falls in to residue. *Bristol v. Bristol*, V, 335.

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Passing as personalty under direction to sell. *Milwaukee Prot. Home v. Becher*, VIII, 564.

Pass to heir at law in absence of evidence that residuary devisee was intended to receive them. *Rizer v. Perry*, III, 303.

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Injunction to restrain, by contingent remainderman against life tenant. *The University v. Tucker*, VI, 597.

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See also DOWER, ELECTION, HUSBAND AND WIFE.

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Dwelling destroyed by cyclone, right to have rebuilt. *Nelson v. Barnett*, VII, 559.

Entitled to one-third of personal estate though more than two-thirds bequeathed to children. *Estate of Lyon*, V, 558.

Homestead, right to, not affected by remarriage. *Fore v. Fore's Estate*, VIII, 114.

— by settlement and distribution of estate. *Fore v. Fore's Estate*, VIII, 114.

Insanity of, election by court. *Van Steenwyck v. Washburn*, IV, 337.

Marriage of, revoking will. *Matter of Kaufman*, VIII, 233.

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Limits of cross-examination. *Schmidt v. Schmidt*, VIII, 140.

Competency.

Executor, to establish will, except as to transactions with, or statements made by testator. *Key v. Holloway*, I, 360.

Executor—legatee on contested probate. *Hays v. Ernst*, VIII, 381.

Heir-at-law, in support of will by which he is disinherited. *Smalley v. Smalley*, I, 566.

— legacy is conceded to be less than his interest as heir. *Smalley v. Smalley*, I, 566.

Husband of one of the heirs interested in the rejection of the will, but not a party to the record. *Milton v. Hunter*, I, 531.

Husband of maker of note given for land held by him, as to anything occurring in testator's life time to invalidate note. *Troup v. Rice*, I, 18.

Legatee, as to matters equally within knowledge of testator. *Schofield v. Walker*, V, 211.

Pendency of similar claim against estate. *Warren v. McGill*, VIII, 509.

Sufficiency of finding as to. *Blythe v. Ayres*, VIII, 493.

To prove sanity of testator. *Frear v. Williams*, I, 85.

To prove signature of will as distinguished from its acknowledgement or adoption. *Will of Convey*, I, 90.

To prove testator's knowledge of the contents of the will. *Key v. Holloway*, I, 360.

WILL.

See, also, CODICIL, CONTINGENT WILL, EXECUTION OF WILLS, HOLOGRAPHIC WILL, JOINT WILL, PUBLICATION, NUNCUPATIVE WILLS,

WILL—(Continued).**PROBATE, REPUBLICATION, SIGNATURE.**

Alteration and mutilation, see **ALTERATION OF WILLS.**

As covenant to stand seized to use. *Bolman v. Overall*, VI, 59.

As to some property and contract as to balance. *Reid v. Hazleton*, VI, 532.

Birth of issue, effect of, see **REVOCATION OF WILLS.**

Codicil providing that in certain contingency earlier, and otherwise later, will should take effect. *Bradish v. McClellan*, III, 201.

Conveyance of property, see **REVOCATION OF WILL.**

Discovery of, effect on administration. *Franklin v. Franklin*, VIII, 183.

Enforcement of contract in form of. *Bolman v. Overall*, VI, 59.

Evidence that will was intended to be operative only on the happening of contingency. *Sewell v. Slingshuff*, II, 597.

Executed for valuable consideration, as irrevocable contract. *Bolman v. Overall*, VI, 59.

Extraneous document not made part except by clear reference. *Baker's Appeal*, IV, 128.

Marriage, effect of, see **REVOCATION OF WILLS.**

Mutilation, see **REVOCATION OF WILLS.**

Paper purporting to be, to be filed in probate court within proper time after death. *Kenniston v. Adams*, VI, 223.

Probate of paper not in form complying with statute, ineffective. *Wall v. Wall*, VI, 180.

Provisions of another will when to be deemed part. *Gerrish v. Gerrish*, I, 59.

Recital that it is executed "in anticipation of departure from Baltimore and to provide for possible contingencies," deceased returning safely from the contemplated trip. *Kelleher v. Kernan*, III, 417.

Form.

No particular form required. *Armstrong v. Armstrong*, I, 206.

Assignment. *Robinson v. Brewster*, VIII, 235.

Deed conveying present interest on trusts testamentary in character. *Bromley v. Mitchell*, VIII, 229.

— conveying present title but reserving use and possession for life. *Beebe v. McKenzie*, VII, 538.

— bargaining and selling property, reserving right to use and dispose of it. *Kelleher v. Kernan*, III, 417.

— expressed to take effect at death. *Cover v. Stem*, VI, 576.

— for life of grantor and wife, grantee to pay taxes, take care of grantor and wife during life, etc. *Castor v. Jones*, III, 148.

— inoperative for want of delivery. *Estate of Skerritt*, V, 37.

— passing interest or right in real estate to accrue at death of maker. *Reed v. Hazleton*, VI, 532.

— to be delivered after death, as codicil. *Kelly v. Richardson*, III, 897.

Entries in a diary made by testator at different times and over his signature. *Reagan v. Stanley*, III, 251.

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— not signed. *Reagan v. Stanley*, III, 251.

Instrument commencing "Know all men by these presents," and ending "this conveyance to take effect from and after death." *Armstrong v. Armstrong*, I, 206.

Letter, instrument in form of. *Crowley v. Knapp*, I, 390.

Letter signed and attached to copy of deed of gift. *Estate of Skerritt*, V, 87.

Sealed instrument for payment of specified sum payable at death by estate of maker. *Cover v. Stem*, VI, 548.

Writing by deceased on back of business letter. *Byers v. Hoppe*, IV, 218.

Writing declaring "I do hereby on and after the day of my death, by this will, grant and convey and assign," etc., sealed and attested but not delivered. *Miller v. Holt*, I, 199.

Validity.

Conflict of laws. *Succession of Gaines*, VIII, 479.

Invalid as to realty, valid as to personalty. *Hays v. Ernst*, VIII, 381.

Paper invalid as, as declaration of trust. *Byers v. McAuley*, VIII, 444.

Testator's erroneous belief as to want of legal formality. *Toebbe v. Williams*, III, 333.

— not understanding the English language. *Will of Walter*, V, 239.

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"Advancements." *Porter's Appeal*, II, 234; *In re Zeile*, VI, 108.

"All my estate." *Estate of Gotzean*, V, 418.

"All my worldly goods consisting." *Farish v. Cook*, IV, 156.

"All the residue." *Pierce v. Stidworthy*, VI, 254.

"And" for "or." *Cody v. Bunn*, VII, 520.

"Any other claim she may have." *Rusling v. Rusling's Ex'rs*, V, 251.

"Baiaance of money." *Stannard v. Barnum*, I, 160.

"Bank stock" as bonds. *Clark v. Atkins*, IV, 97.

— as deposits. *Tomlinson v. Bury*, VI, 261.

"Benefit," charitable assistance and benefit. *Tappan's Appeal*, V, 193.

"Bequeath" as give or devise. *Shumate v. Bailey*, VIII, 276.

"Child left" includes posthumous child. *Pearson v. Carlton*, III, 333.

"Children." *Millett v. Ford*, V, 884.

— as "issue." *Matter of Paton*, VI, 6.

— "of deceased children." *Cummings v. Plummer*, IV, 279.

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"Civil suits." *State v. Mann*, VII, 616.

"Claim." *Rusling v. Rusling's Ex'rs*, V, 251.

"Comfortable support." *Alsop v. Clark*, V, 497.

"Death," "in case of the death of either of them." *Jones v. Webb*, VI, 422.

WORDS AND PHRASES—(Continued).

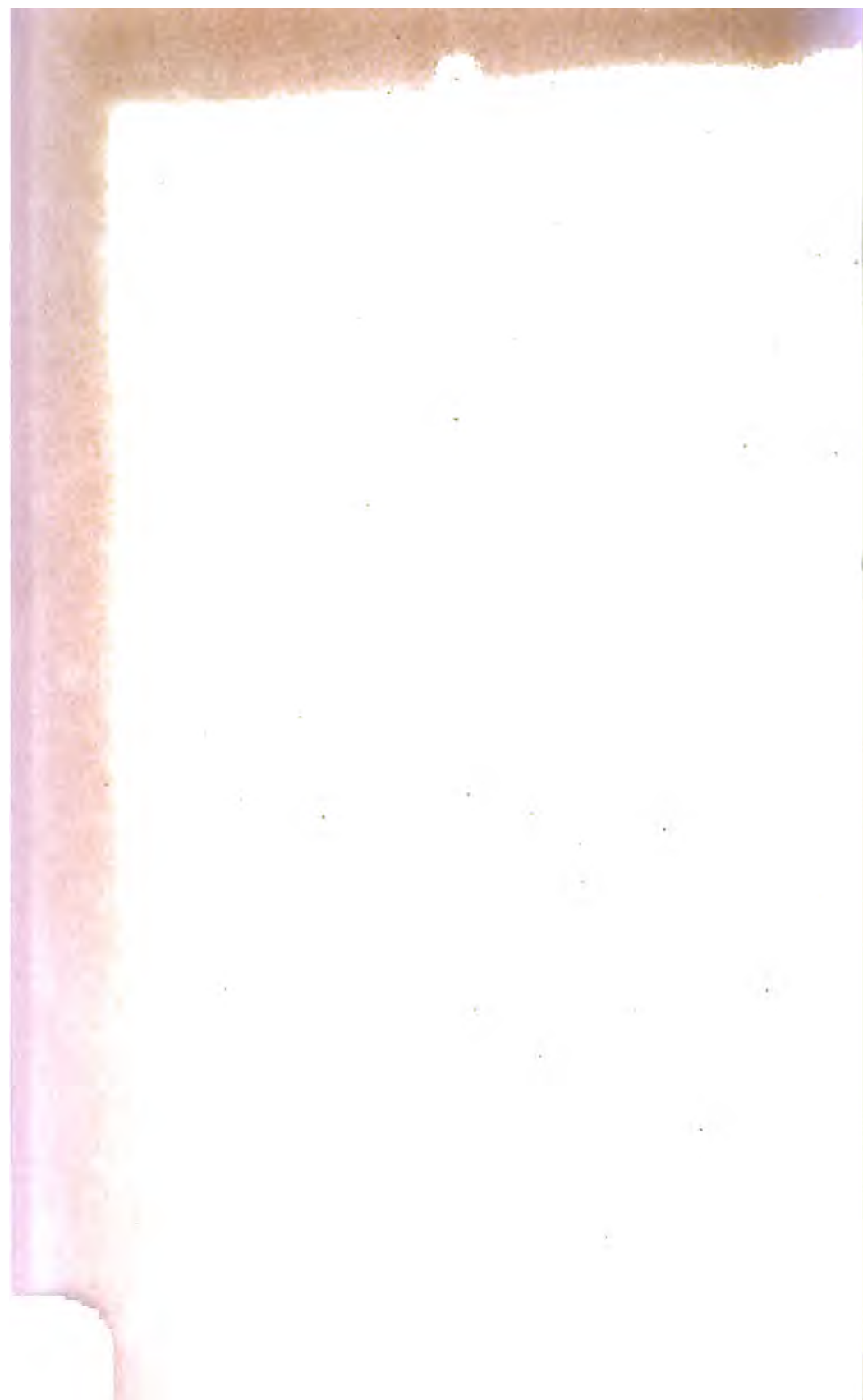
- "Descend." *Halstead v. Hall*, III, 462.
- "Devised." *Bliven v. Seymour*, II, 447.
- "Devises or heirs-at law" in insurance policies. *Alexander v. North-western Masonic Aid Association*, VII, 163.
- "Die, leaving no legal heirs of their own body." *In re Swinburne*, VII, 855.
- "without child or children." *McCormick v. McElligott*, VII, 565.
- "without issue." *Pinkham v. Blair*, I, 114; *Hackney v. Tracey*, VII, 843.
- "Dividends." *Gibbons v. Mahon*, VII, 392.
- "and increase." *Brinley v. Grou*, IV, 324.
- "Division among my heirs according to the laws of the state." *Alexander v. Wallace*, II, 291.
- "During widowhood." *Stillwell v. Knapper*, I, 211; *Frey v. Thompson's Adm'r*, II, 288.
- "Effects." *Page v. Forest*, III, 438.
- "Estate" as realty. *Shumate v. Bailey*, VIII, 276.
- "all my estate." *Estate of Gotzian*, V, 41.
- "Equally distributed." *Allen v. Allen*, I, 479.
- "Family." *Stuart v. Stuart*, II, 527; *Phillips v. Ferguson*, VII, 460.
- "Foreign" executors and administrators. *Calloway v. Cooley*, VIII, 360.
- "Good and sufficient support." *McKenzie v. Ashley*, VI, 303.
- "Goods," "all my worldly goods." *Flurish v. Cook*, IV, 156.
- "Goods and chattels." *Peaslee v. Fletcher*, VII, 217.
- "Heirs." *Allen v. Craft*, V, 365.
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- as children. *Franklin v. Franklin*, VIII, 183.
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- in devisee to heirs of living person. *Stuart v. Stuart*, II, 527.
- of husband. *Dodge's Appeal*, IV, 357.
- "Heirs and next of kin" of wife, husband not included. *Ivins' Appeal*, IV, 176.
- "Heirs at law." *Kelly v. Vigas*, V, 315.
- in gift over. *Lincoln v. Perry*, VII, 289.
- "Heirs of his body." *Millett v. Ford*, V, 384; *Summers v. Smith*, VII, 118.
- "Heirs or descendants." *Huston v. Read*, I, 501.
- "Hereinbefore given." *Reid v. Walbach*, VIII, 131.
- "Household property." *Frazer's Accounting*, III, 258.
- "If any," in direction for payment of debts. *Rusling v. Rusling's Ex'rs*, V, 251.
- "If deceased." *Bronson v. Phelps*, V, 231.
- "Issue." *Palmer v. Horn*, II, 92; *Allen v. Craft*, V, 365.
- as children. *Peirce v. Hubbard*, VIII, 383.
- "of my children." *Outcalt v. Outcalt*, V, 272.

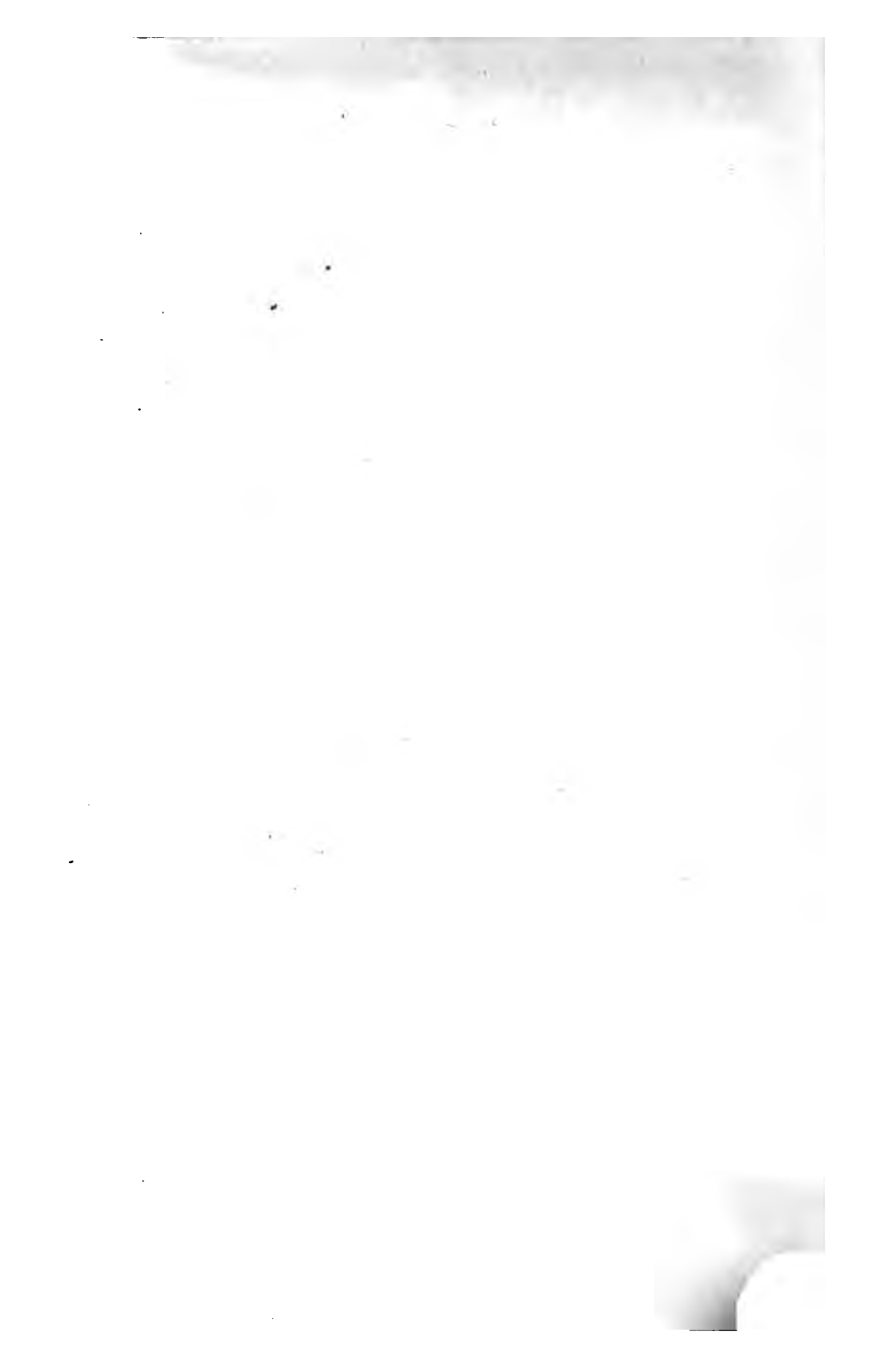
WORDS AND PHRASES—(Continued).

- "Lawful heirs." *Conger v. Lowe*, VII, 189.
- as children. *Patrick v. Morehead*, II, 261.
- "Legacy." *Pratt v. McGhee*, III, 171.
- "Legal representatives" as heirs. *Rivenett v. Rivenett*, IV, 264.
- "Living at the time of my decease." *Randolph v. Randolph*, V, 406.
- "Loans and advances." *Wright's Appeal*, I, 125.
- "Male issue." *Wester v. Scott*, IV, 548.
- "My next of kin" in limitation over. *Pinkham v. Blair*, I, 114.
- "Money." *Decker v. Decker*, VI, 455.
- "Necessary for their personal comfort." *Peckham v. Lego*, VII, 66.
- "Next of kin" of wife. *Wetter v. Walker*, I, 519.
- of deceased legatee. *Swasey v. Jaques*, V, 412.
- "Nieces," wives of nephews not included. *Huston v. Read*, I, 501.
- "Of" as "to." *In re Swinburne*, VII, 355.
- "Or" as "and." *Cody v. Bunn*, VII, 520.
- "Ornaments." *In re Traylor*, VI, 67.
- "Part." *Lewis' Appeal*, V, 466.
- "Party interested." *Russell v. Hartt*, II, 297.
- "Personal property." *Evans v. Opperman*, VII, 550.
- "all the personal property." *Simmons v. Beazle*, VII, 408.
- "situated within the state." *Speed v. Kelly*, II, 553.
- "Personal representatives." *Davies v. Davies*, VI, 361.
- "Portion." *Lewis' Appeal*, V, 466.
- "Possessions." *Blaisdell v. Hight*, I, 311.
- "Presence" of testator. *Cook v. Winchester*, VII, 109.
- "Productive funds on good securities." *Ward v. Kitchen*, I, 355.
- "Property." *Robinson v. Randolph*, V, 447.
- "Provisions made for wife by statute." *Kelly v. Reynolds*, I, 329.
- "Purchase." *Starum v. Bostwick*, VII, 501.
- "Ready money." *Smith v. Burchard*, III, 236.
- "Received," "shall have received his share." *Johnes v. Beers*, VII, 435.
- "Relatives," "near relatives." *Handley v. Wrightson*, III, 530.
- "Religious." *Simpson v. Welcome*, II, 248.
- "Remains," "what then remains." *Fuote v. Saunders*, II, 73.
- "Rent" as "real." *Baird v. Boucher*, III, 467.
- "Rents, interest and income." *Matter of Kernochan*, V, 260.
- "Required for his personal use." *Hull v. Holloway*, VII, 75.
- "Resident poor." *Webster v. Morris*, V, 158.
- "Resisting probate." *Donegan v. Wude*, III, 206.
- "Rest and residue." *Chapman v. Click*, VI, 810.
- "Right heirs." *Ballentine v. Wood*, V, 244.
- "Settlement of estate." *Calkins v. Smith*, I, 154.
- "Sell and convey any real estate." *Vernon v. Corille*, V, 184.
- "Share," "part," "portion." *Lewis' Appeal*, V, 466.
- "Signature." *Succession of Armant*, VII, 361.
- "Situated in the state," personal property. *Speed v. Kelly*, II, 553.

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- "Stocks" as "bonds." *Clark v. Aikens*, IV, 97.
"Support." *Morford v. Dieffenbacker*, V, 135.
— "comfortable support." *Aisup v. Clark*, V, 497.
— good and sufficient. *McKenzie v. Ashley*, VI, 303.
"Surviving children." *Eberts v. Eberts*, I, 559.
"Survivors." *Gorham v. Betts*, VI, 141.
"Their children." *Evans v. Opperman*, VII, 550.
"This will." *Sloane v. Stevens*, VI, 1.
"To be for her comfort and support." *Maynard v. Cleaves*, VII, 210.
"Unincumbered real estate." *Crabb v. Young*, III, 265.
"Use and improvement." *Peckham v. Lego*, VII, 66.
"What then remains." *Footte v. Saunders*, II, 73.
"Without legal heirs." *Underwood v. Robbins*, VII, 52.
"Will," codicil as. *Hastings v. Turner*, VII, 15.
"Willful default, misconduct or neglect." *Crabb v. Young*, III, 265.
"Wish." *Bliven v. Seymour*, II, 447.
"Youngest child shall become of lawful age." *Simpson v. Cook*, I, 27.







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